DOCKET

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(10)

No. 86-595-CFX
Status: GRANTED

Title: United States, Petitioner
v.
Joseph A. Fausto

Docketed:
October 10, 1986

Court: United States Court of Appeals for the Federal Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Fausto,Joseph A., Nannes,John M.

Entry	Date	Note	Proceedings and Orders
1	Jul 30 1986		Application for extension of time to file petition and order granting same until October 11, 1986 (Chief Justice, August 11, 1986).
2	Oct 10 1986	G	Petition for writ of certiorari filed.
3	Nov 12 1986		DISTRIBUTED. November 26, 1986
4	Nov 21 1986	X	Brief of respondent Joseph A. Fausto in opposition filed.
5	Nov 21 1986	G	Motion of respondent for leave to proceed in forma pauperis filed.
6	Dec 3 1986		REDISTRIBUTED. January 9, 1987
8	Dec 31 1986	X	Reply brief of petitioner United States filed.
9	Jan 5 1987	D	Motion of respondent for leave to file a cross-petition for writ of certiorari, out-of-time, filed.
10	Jan 12 1987		Motion of respondent for leave to proceed in forma pauperis GRANTED.
11	Jan 12 1987		Motion of respondent for leave to file a cross-petition for writ of DENIED.
12	Jan 12 1987		Petition GRANTED.
			**********
14	Jan 21 1987		DISTRIBUTED. Feb. 20, 1987. (Above motion).
15	Feb 5 1987		Record filed.
16	Feb 5 1987		Record filed.
17	Feb 5 1987		Certified copies of docket entries received.
21	Jan 20 1987	D	Motion of respondent to amend the question presented filed.
22	Mar 2 1987		Motion of respondent to amend the question presented DENIED. The motion of respondent to file a brief pro se is granted. The motion of respondent to present oral argument pro se is denied. John M. Nannes, Esquire, of Washington, D.C., a member of the Bar of this Court, is invited to brief and argue this case, as amicus curiae, in support of the judgment below.
24	Feb 24 1987		Order extending time to file brief of petitioner on the merits until March 30, 1987.
25	Mar 20 1987		Order further extending time to file brief of petitioner on the merits until April 22, 1987.
26	Apr 22 1987		Brief of petitioner United States filed.
28	May 7 1987		Order extending time to file brief of responcent on the merits until June 25, 1987.
29	Jun 5 1987	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.

No. 86-595-CFX

Entry	Date	Note	Proceedings and Orders
30	Jun 15 1987		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
31	Jun 15 1987		Order further extending time to file brief of respondent on the merits until July 10, 1987.
32	Jun 22 1987		Application of John M. Nannes, Esq. for leave to file a brief as amicus curiae in excess of the page limits
33	Jun 22 1987		filed (A-938), and order granting same by Rehnquist, C.J., on June 23, 1987. The brief may not exceed 50 pages.
34	Jul 10 1987		Brief amicus curiae of John Nannes by invitation of the Court filed.
35	Jul 10 1987		Brief amicus curiae of AFGE filed.
36	Jul 10 1987		Lodging received.
37	Jul 10 1987		Brief amicus curiae of Joseph D. Finn, et al. filed.
38	Jul 20 1987		CIRCULATED.
39	Jul 21 1987	X	Brief of respondent Joseph A. Fausto filed.
40	Jul 20 1987		SET FOR ARGUMENT. Wednesday, October 7, 1987. (3rd case).
41	Sep 29 1987	X	Reply brief of petitioner United States filed.
42	Oct 7 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86-595

No.

Supreme Court, U.S.
FILED
OCT 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH A. FAUSTO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
LOUIS R. COHEN
Deputy Solicitor General
CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General
DAVID M. COHEN
ROBERT A. REUTERSHAN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

62 pp

QUESTION PRESENTED

The Civil Service Reform Act of 1978 provides a comprehensive set of remedies, including in specified circumstances review by the Merit Systems Protection Board and judicial review of the action of the Board, for federal civil service personnel who suffer adverse personnel actions. The question presented is whether non-veteran personnel in the "excepted service," for whom the Act does not provide a right of review by the Board or any court, may obtain judicial review of adverse personnel actions under the Tucker Act, 28 U.S.C. 1491.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	1
Statement	2
Reasons for granting the petition	9
Conclusion	16
Appendix A	1a
Appendix B	9a
Appendix C	10a
Appendix D	24a
Appendix E	30a

TABLE OF AUTHORITIES

Cases:

Barnhart v. *Devine*, 771 F.2d 1515	12
Block v. *Community Nutrition Institute*, 467 U.S. 340	10, 15
Bivens v. *Six Unknown Named agents of the Federal Bureau of Narcotics*, 403 U.S. 388	11
Broadway v. *Block*, 694 F.2d 979	12
Brown v. *General Services Administration*, 425 U.S. 820	10, 15
Burroughs v. *OPM*, 764 F.2d 1300, rehearing denied, 784 F.2d 933	12
Bush v. *Lucas*, 462 U.S. 376	11
Carducci v. *Regan* 714 F.2d 171	5, 12, 15
Chu v. *United States*, 773 F.2d 1226	15
Dugan v. *Ramsay*, 727 F.2d 192	12
Fowler v. *United States*, 633 F.2d 1258	15
Greenway v. *United States*, 163 Ct. Cl. 72	7
Lindahl v. *OPM*, 470 U.S. 768	10
Lovshin v. *Department of the Navy*, 767 F.2d 836, cert. denied, No. 85-882 (Apr. 7, 1986)	4
McClary v. *United States*, 775 F.2d 280	15
Pinar v. *Dole*, 747 F.2d 899, cert. denied, 471 U.S. 1016	11, 15
Regional Rail Reorganization Act Cases, 419 U.S. 102	15
United States v. *Connolly*, 716 F.2d 882, cert. denied, 465 U.S. 1065	8

Cases—Continued: Page

United States v. *Erika, Inc.*, 456 U.S. 201 10
Velt v. *Heckler*, 746 F.2d 508 ..... 11, 15
Vitarelli v. *Seaton*, 359 U.S. 535 15
Weatherford v. *Dole*, 763 F.2d 392 12

Statutes and regulations:

Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 *et seq.* 2
Ch. 12, 5 U.S.C. 1201 *et seq.*:
5 U.S.C. 1204 5
5 U.S.C. 1206 5
Ch. 21, 5 U.S.C. 2101 *et seq.*:
5 U.S.C. 2102(a) 2
5 U.S.C. 2103(a) 2
5 U.S.C. 2108(3) 3
Ch. 23, 5 U.S.C. 2301 *et seq.*:
5 U.S.C. 2302 5
5 U.S.C. 2302(a)(2)(B) 5
Ch. 33, 5 U.S.C. (& Supp. II) 3301 *et seq.*:
5 U.S.C. (& Supp. II) 3301 2
5 U.S.C. 3302(1) 2
Ch. 43, 5 U.S.C. 4301 *et seq.*:
5 U.S.C. 4301(2) 3
5 U.S.C. 4303(b) 3
5 U.S.C. 4303(e) 3, 12
Ch. 55, 5 U.S.C. 5501 *et seq.*:
5 U.S.C. 5596(b) 7
Ch. 75, 5 U.S.C. 7501 *et seq.*:
5 U.S.C. 7501(1) 4, 14
5 U.S.C. 7503 4
5 U.S.C. 7511(a)(1) 4, 8, 14
5 U.S.C. 7511(c) 4, 9, 14
5 U.S.C. 7513(a) 3
5 U.S.C. 7513(d) 4
Ch. 77, 5 U.S.C. 7701 *et seq.*:
5 U.S.C. 7703(b) 6
5 U.S.C. (Supp. II 1978) 7703(b)(1) 6
Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 127(a), 96 Stat. 25 6

Statutes and regulations—Continued: Page

Tucker Act:
28 U.S.C. 1491 ..... 2, 7
28 U.S.C. 1346(a)(2) 13
5 U.S.C. 701(a)(1) 11
28 U.S.C. 1295(a)(2) 13
28 U.S.C. 1331 12
28 U.S.C. (Supp. II 1978) 2342(6) 6
31 U.S.C. (1976 ed.) 638a(c)(2) 6
31 U.S.C. 1349(b) 6
Exec. Order No. 10,577, 3 C.F.R. 218 (1954-1958 Comp.) 2
5 C.F.R.
Section 213.101(a) 2
Section 213.3102(a) 2
Section 213.3102(d) 2, 9
Section 213.3102(f) 2
Section 213.3102(hh)(1979) 2
Section 213.3301 2
Section 752.401(b)(3) 4, 14
Section 752.401(b)(4) 4, 14
Section 771.205 10
Section 771.206(b) 10
Section 315.801 *et seq.* 4

Miscellaneous:

Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings on S. 2640, S. 2707, and S. 2830 Before the Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess. (1978) 14
S. Rep. 95-969, 95th Cong., 2d Sess. (1978) 11

In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH A. FAUSTO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra,* 1a-8a, and App., *infra,* 10a-23a (on rehearing)) are reported at 783 F.2d 1020 and 791 F.2d 1554, respectively. The opinion of the Claims Court (App., *infra,* 24a-29a) is reported at 7 Cl. Ct. 459.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 9a) was entered on February 10, 1986, and a timely suggestion of rehearing en banc was denied (App., *infra,* 10a-23a), with an accompanying order, on May 14, 1986. On August 11, 1986, Chief Justice Burger extended the time within which to file a petition for a writ of certiorari to and including October 11, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in App., *infra,* 30a-38a.

STATEMENT

Petitioner was an "excepted service" [1] employee of the Fish and Wildlife Service (FWS) of the Department of the Interior. After protracted proceedings, he received a 30-day suspension for repeated misuse of a government vehicle. He brought suit in the Claims Court seeking, inter alia, back pay for this period. The Claims Court dismissed the complaint on the ground that the comprehensive remedial scheme provided by the Civil Service Reform Act of 1978, which provides for review of suspensions of competitive service[2] employees but not of excepted service employees, precludes such review. The court of appeals, noting that it was deciding "a very important question concerning the jurisdiction of the Claims Court," reversed, holding that excepted service employees may bring such claims under the Tucker Act, 28 U.S.C. 1491.

1. In the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 *et seq.*, Congress comprehensively revised and restated the statutory provisions, codified in various chapters of Title 5, United States Code, governing the personnel procedures of federal

[1] The " 'excepted service' consists of those civil service positions which are not in the competitive service or the Senior Executive Service." 5 U.S.C. 2103(a). Excepted service positions include positions for which it is not practical to hold competitive examinations, such as chaplains, attorneys, and Japanese interpreters (5 C.F.R. 213.3102(a), (d) and (f)) and "positions which are policy-determining or which involve a close and confidential working relationship with the head of an agency or other key appointed officials" (5 C.F.R. 213.3301). Positions may be placed in the excepted service by statute, by the President, or by the Office of Personnel Management. 5 U.S.C. (& Supp. II) 3301, 3302(1); Exec. Order No. 10,577, 3 C.F.R. 218 (1954-1958 Comp.); see 5 C.F.R. 213.101(a). Respondent's position was placed in the excepted service because it was impractical to hold examinations for the position because it was a temporary position. See 5 C.F.R. 213.3102(hh)(1979).

[2] The "competitive service" is defined (5 U.S.C. 2102(a)), in pertinent part, as consisting of

agencies and the rights of agency employees. In particular, Chapter 43, 5 U.S.C. 4301 *et seq.*, requires agencies to evaluate employees' performance in light of the "critical elements" of their jobs; it authorizes removal or reduction in grade on account of unacceptable performance and sets forth the rights of employees who are removed or reduced in grade for this reason. Chapter 75 governs adverse personnel actions (including removals, suspensions, and reductions in grade or pay) other than removals or reductions in grade under Chapter 43; it authorizes agencies to take adverse personnel actions "for such cause as will promote the efficiency of the service" (5 U.S.C. 7513(a)) and sets forth employees' rights of review of such actions.[3]

Chapter 43 defines "employee," for purposes of that Chapter, to include personnel in the excepted service. 5 U.S.C. 4301(2) (App., *infra,* 31a-32a). Accordingly, excepted service personnel who are subject to serious adverse personnel actions under that Chapter have specified rights, including the right to notice, to representation by an attorney, and to "a reasonable time to answer orally and in writing." See 5 U.S.C. 4303(b) (App., *infra,* 32a-33a). Chapter 43 provides that "any employee who is a preference eligible [i.e., a veteran (see 5 U.S.C. 2108(3))] or is in the competitive service" may appeal a removal or reduction in grade under Chapter 43 to the Merit Systems Protection Board (MSPB). 5 U.S.C. 4303(e) (App., *infra,* 33a-34a). However, it provides no such right of appeal to non-veterans in the excepted service.

(1) all civil service positions in the executive branch, except—

(A) positions which are specifically excepted from the competitive service by or under statute;

(B) positions to which appointments are made by nomination for confirmation by the Senate, unless the Senate directs otherwise; and

(C) positions in the Senior Executive Service * * *.

[3] Chapter 75 thus differs from Chapter 43 in that all adverse actions under Chapter 43 relate to inadequate job performance as measured

Chapter 75 defines "employee" to include, inter alia, "an individual in the competitive service who is not serving a probationary or trial period * * * " and, for some purposes, "a preference eligible in the excepted service". 5 U.S.C. 7511(a)(1) (App., *infra,* 36a); see also 5 U.S.C. 7501(1) (App., *infra,* 34a). Chapter 75 provides that "an employee against whom [a serious adverse] action is taken * * * is entitled to appeal to the Merit Systems Protection Board." 5 U.S.C. 7513(d) (App., *infra,* 38a).[4] However, non-veterans in the excepted service, and probationary employees,[5] who are not "employees" for purposes of Chapter 75, have no right to obtain review of adverse actions under Chapter 75. Congress specifically authorized the Office of Personnel Management (OPM) to provide for the application of Chapter 75 to personnel in "any position or group of positions excepted from the competitive service" (5 U.S.C. 7511(c) (App., *infra,* 36a)), but with two exceptions[6] OPM has not chosen to do so.

In sum, both Chapter 43 and Chapter 75 make certain provisions for personnel in the excepted service, but

---

by ratings of performance on the critical elements of employees' jobs, whereas actions taken under Chapter 75 may relate to inadequate job performance or be based on other sorts of inadequacies, including misconduct. See *Lovshin* v. *Department of the Navy,* 767 F.2d 826 (Fed. Cir. 1985), cert. denied, No. 85-882 (Apr. 7, 1986).

[4] The CSRA did not grant the MSPB jurisdiction to consider appeals of minor personnel actions, such as suspensions for less than 15 days. See 5 U.S.C. 7503 (App., *infra,* 35a).

[5] Nearly all employees appointed to career positions in the civil service serve a one-year probationary period. See 5 C.F.R. Pt. 315, Subpt. H.

[6] OPM has provided by regulation that two types of excepted service personnel other than veterans have the rights enumerated in Chapter 75. 5 C.F.R. 752.401(b)(3) ("an employee with competitive status who occupies a position in Schedule B of Part 213 of this title") and 5 C.F.R. 752.401(b)(4) ("an employee who occupies a professional and administrative career (PAC) position in Schedule B of Part 213 of this title").

neither grants the right of appeal to the MSPB to excepted service personnel who are not veterans. Chapter 43 grants certain rights to both competitive and excepted service personnel, but grants the right of appeal only to competitive service personnel and veterans. Chapter 75 authorizes OPM to apply the chapter to non-veteran excepted service personnel, but grants such personnel no rights unless OPM chooses to do so.[7]

The MSPB's decisions on appeals authorized by Chapter 43 or Chapter 75 are subject to review in the Federal Circuit.[8]

2. Respondent, who is not a veteran, held an excepted service position as an Administrative Officer at an FWS camp in Virginia. He was hired in January 1978 for a period to last no longer than the earlier of the closing of the camp or September 30, 1982. In November 1980 he was advised that the FWS intended to terminate him for a number of reasons not relating to his performance of the critical elements of his job, including the repeated unauthorized use of a government vehicle. After replying to the charges against him, respondent was removed from his position in January 1981. App., *infra,* 24a-25a.

---

[7] Excepted service personnel have various rights under other provisions of the CSRA. For example, the CSRA created an Office of Special Counsel (5 U.S.C. 1204) to investigate "prohibited personnel practices" (5 U.S.C. 2302), which are certain specified personnel actions "infected by particularly heinous motivations or disregard of law" (*Carducci* v. *Regan,* 714 F.2d 171, 175 (D.C. Cir. 1983)). Employees in excepted service positions, except for those employees in positions of a confidential or policy-making nature, are protected by the prohibited personnel practices provision. 5 U.S.C. 2302(a)(2)(B) (App., *infra,* 30a-31a). Therefore, the Special Counsel is authorized to investigate charges brought by excepted service personnel alleging that they have been subjected to prohibited personnel practices. 5 U.S.C. 1206. Judicial review of actions taken or not taken by the Special Counsel is quite limited (*Carducci,* 714 F.2d at 175).

[8] As enacted, the CSRA granted the regional courts of appeals and the Court of Claims jurisdiction to review on direct appeal decisions

In September 1981 the FWS camp at which respondent had been employed was closed. It subsequently came to the attention of the FWS that respondent had not been advised of his right, under regulations issued by the Department of the Interior, to file a grievance contesting his removal. The FWS then provided him with the opportunity to do so and, in June 1982, the FWS concluded that removal had been too harsh a penalty for his misconduct. In lieu of removal, the FWS imposed upon respondent the statutorily required minimum penalty for misuse of a government vehicle, a 30-day suspension.[9] The FWS then awarded respondent back pay from February 15, 1981, the date his 30-day suspension would have ended, to September 18, 1981, the date the camp closed. Respondent challenged the grievance decision, claiming that he was entitled to back pay for the period covered by the 30-day suspension and from the date the camp closed to the date of a decision in his favor, but the decision of the FWS was sustained at each level of review provided by the Department of the Interior's regulations. App., *infra,* 25a.

3. After it was determined that respondent, as an employee in the excepted service, had no right to appeal the Department of the Interior's decision to the MSPB (see App., *infra,* 27a), he filed suit in the Claims Court. The government filed a motion for summary judgment, arguing that the Claims Court did not have jurisdiction to

---

of the MSPB. 5 U.S.C. (Supp. II 1978) 7703(b)(1); 28 U.S.C. (Supp. II 1978) 2342(6). Under the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 127(a), 96 Stat. 25, the Federal Circuit has virtually exclusive jurisdiction of appeals from decisions of the Board other than appeals involving claims of discrimination. 5 U.S.C. 7703(b) (App., *infra,* 38a).

[9] Section 638a(c)(2) of Title 31, United States Code (1976 ed.) (now codified at 31 U.S.C. 1349(b)), requires federal agencies to impose the penalty of a 30-day suspension, at a minimum, upon an employee found to have misused a Government vehicle, and provides that an employee may be removed for such misconduct.

entertain respondent's claim. The government contended that by enacting the CSRA Congress had precluded judicial review of disciplinary actions taken against non-veteran employees in the excepted service.

The Claims Court agreed that the CSRA "enumerates an all-inclusive catalogue of remedies for adverse personnel actions" taken against federal employees (App., *infra,* 26a) and concluded that an employee may challenge an adverse personnel action only in accordance with the "comprehensive scheme for review of federal employee personnel actions" established by the CSRA (*ibid.*). Noting that the CSRA did not provide respondent with a right to appeal to the MSPB, the Claims Court held that, in light of Congress's decision not to grant non-veteran excepted service employees any right under the CSRA to judicial review of adverse personnel actions, respondent was not entitled to judicial review of his suspension (*ibid.*). The Claims Court held in the alternative that, if it did have jurisdiction over respondent's claim, he was entitled to no more back pay than he had received from the FWS.[10]

4. The Federal Circuit reversed. It stated (App., *infra,* 3a), citing *Greenway* v. *United States,* 163 Ct. Cl. 72 (1963), that prior to the enactment of the CSRA an excepted service employee could seek redress under "the Tucker Act/Back Pay Act" (App., *infra,* 4a), 28 U.S.C. 1491 and 5 U.S.C. 5596(b), for an alleged violation by an agency of its regulations in taking disciplinary action against him. Stating that this case "presents a very important question concerning the jurisdiction of the Claims Court" (App., *infra,* 3a), the court of appeals concluded that neither the CSRA nor its legislative history gave a clear indication of Congress's intention to repeal the right of excepted service employees to bring suit challenging an adverse action, and held that the Claims Court had juris-

---

[10] The court held that respondent was not entitled to any additional back pay because he had admitted his misuse of a government vehicle and the FWS was therefore required by law to suspend him for at least

diction over respondent's claim. On the merits, while the court of appeals agreed with the Claims Court that respondent was not owed back pay for the period after the camp closed, it held that respondent was entitled to back pay for the period covered by the 30-day suspension (*id.* at 7a-8a). In the court of appeals' view, the FWS's "belated recognition" of respondent's grievance rights barred it from imposing that suspension (*id.* at 8a).

The court declined the government's suggestion of rehearing en banc. However, "because of the importance of the issue" (App., *infra,* 11a), the panel treated our suggestion as a request for rehearing by the panel and issued a second opinion reaffirming its first decision. The court rejected the government's contention that its decision on jurisdiction was contrary to numerous decisions of other courts of appeals dismissing attempts by federal employees to challenge adverse personnel actions through means not prescribed in the CSRA. The court stated that in each other case "the employee was subject to the adverse action provisions of the CSRA and was seeking some sort of additional remedy" (App., *infra,* 22a). In this case, the court said, respondent "was not subject to the adverse action provisions of the CSRA because he was in the excepted service" (*ibid.*).[11]

---

30 days for that misconduct. And since, as an excepted service employee appointed for a limited period of time, respondent had no right to reassignment to another FWS activity after the FWS camp closed on September 18, 1981, he was owed no back pay after that date. Therefore, the court concluded that respondent had been made whole. App., *infra,* 28a-29a.

[11] The court of appeals also stated that its decision was not contrary to its prior decision in *United States* v. *Connolly,* 716 F.2d 882, 886 (Fed. Cir. 1983) (en banc), cert. denied 465 U.S. 1065 (1984), where the court held that probationary employees—who, like non-veteran excepted service personnel are not "employees" under 5 U.S.C. 7511(a)(1)—may not obtain judicial review of adverse actions. The decision in *Connolly* was distinguishable, the court concluded,

REASONS FOR GRANTING THE PETITION

The court of appeals has incorrectly decided a question of considerable practical importance to the federal government. Its decision is inconsistent with several decisions of other circuits holding that federal adverse personnel actions are reviewable under the CSRA or not at all. This Court should grant the petition to resolve that inconsistency and to answer the important question of federal jurisdiction raised by this case.

1. As the court of appeals twice noted (App., *infra,* 3a; *id.* at 12a), the question whether the Claims Court has jurisdiction over challenges to adverse personnel actions brought by employees in the excepted service is very important. We are advised by OPM that the government employs more than 300,000 excepted service employees, including more than 17,000 attorneys (see 5 C.F.R. 213.3102(d)).[12] The decision below opens up to review in the Claims Court any dismissal, reduction in grade or pay, or suspension of such an employee, whenever such action is alleged to violate an agency regulation, despite the evident intent of Congress not to give non-veterans in the excepted service a right to judicial review unless OPM decides pursuant to 5 U.S.C. 7511(c) (App., *infra,* 36a) to extend the rights enumerated in Chapter 75 to them. In view of the large number of employees in the excepted service, and the fact that agencies are required to establish procedures by which employees can challenge employment

---

because the issue there was whether the plaintiff could obtain judicial review under the CSRA and because the legislative history of the CSRA clearly showed that Congress did not intend to provide probationary personnel with a right to review, while in the court's view Congress had not made clear in the legislative history of the CSRA that excepted service personnel had no right to judicial review (App., *infra,* 20a-21a).

[12] OPM has not by regulation granted any of these attorney positions the rights enumerated in Chapter 75, as it is authorized to do by 5 U.S.C. 7511(c) (App., *infra,* 36a) (see note 6, *supra*).

decisions,[13] it is inevitable—especially in view of the large number of government lawyers in the excepted service—that this decision will create a large amount of litigation.

2. The court of appeals erred in concluding that the Claims Court had jurisdiction to consider respondent's claim. This Court recently stated that "[w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved" (*Block* v. *Community Nutrition Institute,* 467 U.S. 340, 345 (1984)). The Court emphasized that " 'clear and convincing evidence' " of an intent to preclude review is not required "in the strict evidentiary sense" (*id.* at 350). Rather, "the presumption favoring judicial review of administrative action may be overcome by inferences of intent drawn from the statutory scheme as a whole" (*id.* at 349).[14] This Court has also "consistently held that a narrowly tailored employee compensation scheme" precludes recovery under more general statutes. *Brown* v. *General Services Administration* 425 U.S. 820, 834-835 (1976).

In enacting the CSRA, Congress "comprehensively overhauled the civil service system" (*Lindahl* v. *OPM,* 470 U.S. 768, 773 (1985)). The CSRA replaced "an outdated patchwork of statutes and rules built up over almost a century" (S. Rep. 95-969, 95th Cong., 2d Sess. 3 (1978)), and the Senate Committee described the changes made by the CSRA as constituting "the most comprehensive reform of the Federal work force since passage of the Pendleton Act in 1883" (*id.* at 1). The structure of the CSRA makes clear that Congress intended not to permit the Claims Court to review suspensions of personnel like respondent under its more general Tucker Act jurisdiction.

[13] OPM requires agencies to establish grievance systems in which employees may raise "any matter of concern or dissatisfaction relating to the employment of an employee which is subject to the control of agency management" (5 C.F.R. 771.205). Employees in the excepted service are not excluded from the coverage of those grievance systems (see 5 C.F.R. 771.206(b)).

[14] Cf. *United States* v. *Erika, Inc.,* 456 U.S. 201, 208 (1982) ("in the context of the [Medicare] statute's precisely drawn provisions," Congress's failure to authorize further review of certain determinations "provides persuasive evidence that Congress deliberately intended to foreclose further review of such claims").

In view of the CSRA's comprehensive scheme of administrative and judicial review, the other courts of appeals that have addressed the question whether personnel actions not subject to review under the CSRA may be subject to judicial review under other statutes have almost unanimously answered that question in the negative.[15] In *Veit* v. *Heckler,* 746 F.2d 508, 511 (9th Cir. 1984), the court stated that "the comprehensive nature of the procedures and remedies provided by the CSRA indicates a clear congressional intent to permit federal court review as provided in the CSRA or not at all." Accordingly, the court held that the existence of the CSRA precluded review by a district court under the Administrative Procedure Act (APA) of an employee's performance evaluation. Similarly, the court in *Pinar* v. *Dole,* 747 F.2d 899 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985), held that a federal employee suspended for two days had no right to review of his suspension in a district court. That was so, according to the Fourth Circuit, because APA review is not available "where the relevant statute 'precludes judicial review,' " and "the statutory scheme of the CSRA reveals that Congress intentionally foreclosed

[15] Similarly, in *Bush* v. *Lucas,* 462 U.S. 367 (1983), this Court held that a federal employee could not sue his superiors for damages under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971). The Court noted that Congress had provided "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations," in deciding not to augment that system with a *Bivens* remedy (*ibid.*).

judicial review to employees who * * * are subjected to disciplinary actions which are modest in nature by providing judicial review only of [major] personnel actions" (747 F.2d at 912 (quoting 5 U.S.C. 701(a)(1)). In *Carducci* v. *Regan*, 714 F.2d 171, 173-174 (D.C. Cir. 1983), the court held that, by its enactment of the CSRA, Congress precluded review of minor personnel actions that, prior to the CSRA's passage, were reviewable under the APA. The court added that if that were not the case, "the exhaustive remedial scheme of the CSRA would be impermissibly frustrated by permitting, for lesser personnel actions not involving constitutional claims, an access to the courts more immediate and direct than the statute provides with regard to major adverse actions" (*id.* at 174).[16]

On rehearing, the court of appeals sought to distinguish the decisions of other circuits holding that CSRA remedies for adverse personnel actions are exclusive on the ground that non-veterans in the excepted service are "not subject to the adverse action provisions of the CSRA," whereas the government employees in the other cases were "subject to the adverse action provisions of the CSRA and [were] seeking some sort of additional remedy" (App., *infra*, 22a). But excepted service personnel *are* protected by the CSRA provisions codified in Chapter 23 relating to "prohibited personnel practices." Excepted service personnel

[16] Other courts have reached similar conclusions. *Barnhart* v. *Devine*, 771 F.2d 1515 (D.C. Cir. 1985) (employees complaining of improper classification must bring their claim to the Office of Special Counsel); *Weatherford* v. *Dole*, 763 F.2d 392 (10th Cir. 1985) (no jurisdiction under 28 U.S.C. 1331 to review reassignment of government employee); *Broadway* v. *Block*, 694 F.2d 979, 986 (5th Cir. 1982) (no APA jurisdiction to review reassignment). Two courts have held to the contrary. *Burroughs* v. *OPM*, 764 F.2d 1300 (9th Cir. 1985), rehearing denied, 784 F.2d 933 (1986) (authorizing mandamus review of classification claim); *Dugan* v. *Ramsay*, 727 F.2d 192, 194-195 (1st Cir. 1984) (authorizing review under APA of job applicant's claim).

are covered by Chapter 43, which governs the rights of employees threatened with dismissal or demotion for inadequate job performance (although Congress carefully denied non-veterans in the excepted service the right to appeal to the MSPB and the courts). And Chapter 75, dealing with adverse personnel actions for other causes (such as misuse of a government vehicle) *does* cover excepted service personnel who are veterans and other excepted personnel that OPM chooses to cover by regulation. See pages 3-5, *supra*. Therefore, the court of appeals was altogether wrong in stating (App., *infra*, 21a) that non-veterans in the excepted service are not subject to the CSRA. Accordingly, the cases from other circuits are not distinguishable on the basis stated by the court of appeals.[17]

Moreover, the very fact on which the court of appeals relied in purporting to distinguish this case from the decisions of other circuits—that federal employees other than non-veterans in the excepted service are granted more extensive remedies under the CSRA—does not support the conclusion that respondent should be permitted to proceed under the Tucker Act, but instead demonstrates that Congress did not want this particular class of employees to be

[17] While there is no conflict in the circuits on the precise issue whether non-veterans in the excepted service may obtain judicial review of adverse personnel decisions, there is no realistic possibility of such a conflict arising, because excepted service employees subjected to adverse actions may, as a result of the decision here, challenge that decision in the Claims Court under the Tucker Act and the Back Pay Act by alleging that the adverse action was taken in violation of agency regulations, and the decision of the Claims Court would be reviewed in the Federal Circuit. In addition, any claim filed in a district court pursuant to 28 U.S.C. 1346(a)(2) (granting district courts jurisdiction concurrent with the Claims Court for claims against the United States not exceeding $10,000 "founded upon any regulation of an executive department") is reviewable in the Federal Circuit, rather than in one of the regional courts of appeals, under 28 U.S.C. 1295(a)(2).

able to obtain judicial review. It could hardly be clearer that personnel such as respondent were not forgotten by the draftsmen of the CSRA; rather they were deliberately granted lesser rights than other federal employees. The adverse action in this case—a 30-day suspension for repeated misuse of a government vehicle—was the type of action that is governed by Chapter 75 rather than Chapter 43. Non-veteran excepted service personnel have no rights under Chapter 75 because they are not "employees" under Chapter 75. 5 U.S.C. 7501(1), 7511(a)(1) (App., *infra*, 34a, 36a). It is clear that Congress recognized that it was excluding them because it expressly gave OPM authority to "provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office." 5 U.S.C. 7511(c) (App., *infra*, 36a).[18] OPM has provided that a limited number of non-veteran positions in the excepted service have the rights enumerated in Chapter 75, including the right of MSPB and judicial review (5 C.F.R. 752.401(b)(3) and (4) (see note 6, *supra*)), but respondent did not occupy one of those positions.

Thus, Congress carefully included certain excepted service positions in the definition of "covered positions" in the

[18] The Chairman of the Civil Service Commission, testifying at the hearings leading to the enactment of the CSRA, recognized that under Section 7511(c) "the Office of Personnel Management is authorized to extend adverse action and appeals coverage to positions administratively excepted from the competitive service" (*Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings on S. 2640, S. 2707, and S. 2830 Before the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 99 (1978) (statement of Alan K. Campbell)). He added that "[p]resently employees in the excepted service (other than those entitled to veteran preference) are entitled to only those rights which may be provided by agency regulations, without the right of appeal to the Civil Service Commission" (*id.* at 99-100). Thus it seems clear that Congress understood, as Mr. Campbell stated, that under the CSRA non-veterans in the excepted service would have the right to appeal only if OPM so provided.

prohibited personnel practices provision, granted excepted service personnel limited rights (not including the right to obtain judicial review) under Chapter 43, and provided that OPM could extend the rights enumerated in Chapter 75 to them. See pages 3-5, *supra*. This careful and comprehensive scheme demonstrates that with limited exceptions not relevant here Congress simply did not want to give non-veteran excepted service personnel the right to review of adverse actions by the MSPB and the courts.[19]

While it is true, as the court of appeals noted (Pet. App. 3a-4a), that agencies are bound by their regulations (*Vitarelli* v. *Seaton*, 359 U.S. 535, 539-540 (1959)), and that repeals by implication are disfavored (*Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133 (1974) (no implied repeal of Tucker Act remedy)), it does not follow that judicial review is warranted to ensure that agencies comply with their regulations when the relevant statute (here the CSRA) clearly and convincingly precludes judicial review. Cf. *Block*, 467 U.S. at 345; *Brown*, 425 U.S. at 834-835; *Pinar*, 747 F.2d at 912. The structure of the CSRA clearly establishes that Congress intended "to permit federal court review as provided in the CSRA or not at all" (*Veit*, 746 F.2d at 511). As the court concluded in *Carducci* (714 F.2d at 173 (emphasis in original)), "the CSRA implicitly *eliminated* a right of action that previous-

[19] It is not at all surprising that Congress intended employees in the excepted service to have limited rights in adverse action proceedings, since many ~~expected~~ Excepted service personnel hold professional or policy-making positions (see note 1, *supra*) over which their employers have traditionally had discretion: "it is well established that an employing agency is free to discharge excepted service employees without cause" (*Chu* v. *United States*, 773 F.2d 1226, 1228 n.2 (Fed. Cir. 1985)), and "without either a statement of reasons for discharge or adverse action appeal rights" (*Fowler* v. *United States*, 633 F.2d 1258, 1262 (8th Cir. 1980)), in the absence of a statute or regulation providing to the contrary.

ly existed." Therefore respondent had no right to obtain review in the Claims Court.

The court of appeals' decision would allow non-veterans in the excepted service to go directly to court with claims that they were demoted or fired in violation of applicable regulations, while competitive service employees and veterans are required to file their initial claims with the MSPB (*McClary* v. *United States,* 775 F.2d 280 (Fed. Cir. 1985)). Thus, non-veterans in the excepted service—to whom Congress plainly granted lesser rights under the CSRA than to competitive service employees and veterans—are given "an access to the courts more immediate and direct than the statute provides with regard to" those other employees (*Carducci*, 714 F.2d at 174). Congress did not intend such an anomalous result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
LOUIS R. COHEN
Deputy Solicitor General
CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General
DAVID M. COHEN
ROBERT A. REUTERSHAN
Attorneys

OCTOBER 1986

APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

Appeal No. 85-2272

JOSEPH A. FAUSTO, APPELLANT

v.

THE UNITED STATES, APPELLEE

[Feb. 10, 1986]

Before RICH, BALDWIN, and BISSELL, Circuit Judges.

BISSELL, Circuit Judge.

Joseph A. Fausto appeals from a decision of the United States Claims Court, reported at 7 Cl.Ct. 459 (1985), dismissing Fausto's complaint and holding that the Civil Service Reform Act of 1978 establishes so comprehensive a scheme for review of federal employee personnel actions as to preclude jurisdiction in the Claims Court. Alternatively, the court held that he had recovered all back pay to which he was entitled. We reverse.

BACKGROUND

On January 8, 1978, Fausto was hired by the Department of the Interior Fish and Wildlife Service (FWS) as an administrative officer for the Young Adult Conservation Corps (YACC) camp at the Back Bay National Wildlife Refuge in Virginia Beach, Virginia. His position was in the excepted service, 5 C.F.R. § 213.3102(hh) (1978), and the term of his appointment was for the duration of the

YACC program at the Refuge, not to exceed a certain date. On January 16, 1981, based on charges including the unauthorized use of a government vehicle, FWS removed Fausto for cause. FWS informed him of its decision by a memorandum dated January 2, 1981, however, FWS did not inform him of his grievance rights which included the right to a formal hearing conducted by a grievance examiner.

On September 18, 1981, the FWS permanently closed the camp. Later, by letter dated March 22, 1982, FWS admitted that Fausto had not been apprised of his grievance rights, and offered him the opportunity to challenge his removal.

Fausto filed a formal grievance. On June 30, 1982, FWS concluded, based on the administrative file without a hearing, that he should not have been removed. Instead, FWS imposed a thirty-day suspension without pay for the unauthorized use of a government vehicle (FWS decided the other charges were *de minimis* and warranted no penalty). Accordingly, Fausto received back pay from February 15, 1981, the date the thirty-day suspension would have ended, until September 18, 1981, the date the camp was officially closed.

Claiming that this was inadequate relief, Fausto pursued his administrative claim to the Secretary of the Interior, who upheld the FWS decision. In February 1983, Fausto filed a Back Pay Act action in the Claims Court, seeking back pay for the period of his allegedly unwarranted suspension as well as for the period beyond his separation date.

The government contended that the Civil Service Reform Act (CSRA) enumerated an all-inclusive catalogue of remedies for adverse personnel actions and therefore impliedly precluded judicial review of federal employee claims either in the Claims Court or any other judicial forum. On cross-motions for summary judgment, the Claims Court held for the government.

DISCUSSION

I.

This case presents a very important question concerning the jurisdiction of the Claims Court. On appeal, the government presses its argument that the CSRA impliedly precludes any judicial review of personnel actions taken against federal employees that are *not* redressable through the scheme of administrative and judicial remedies established by the CSRA. This is the issue we reserved in *McClary v. United States*, 775 F.2d 280, 282 (Fed.Cir.1985). In that case, we considered the Tucker Act jurisdiction of the Claims Court in a case which could have been heard by the Merit Systems Protection Board and held that "[w]here an employee is provided a means of redress under the CSRA, that is, an appeal to the Board, the employee does not have an independent cause of action in the Claims Court." *Id.*. at 282.

Fausto is a nonpreference eligible employee in the excepted service. This court has earlier ruled in an unpublished opinion that he has no right of redress by appeal to the Board. *Fausto v. Department of the Interior*, 738 F.2d 454 slip op. at 3 (Fed.Cir.1984).

There is no doubt that prior to the CSRA an employee in Fausto's situation could have maintained a suit in the Court of Claims. An agency regulation, 370 DM 772,3.22A, granted him certain rights and the agency was bound by its own regulation *Vitarelli v. Seaton*, 359 U.S. 535, 539-40, 79 S.Ct. 968, 972-73, 3 L.Ed.2d 1012 (1959) (Schedule A employee in the Department of the Interior); *Service v. Dulles*, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957). A suit for back pay alleging a violation of such regulations was cognizable in the Court of Claims. *Greenway v. United States*, 163 Ct.Cl. 72, 75, 81-82 (1963) (a non-veteran, excepted appointment, probationary em-

ployee covered by valid departmental regulation entitled to trial on merits for alleged arbitrary dismissal based on well-pleaded complaint).

By the terms of the Federal Courts Improvement Act of 1982, the Tucker Act/Back Pay Act jurisdiction of the former Court of Claims is now reposed in the Claims Court. The government argues that with respect to federal civilian employee suits concerning personnel actions, the historic Tucker Act/Back Pay Act jurisdiction to review such actions has been repealed by the CSRA.

That argument does not withstand scrutiny in this case. "One canon of construction is that repeals by implication are disfavored." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133, 95 S.Ct. 335, 353, 42 L.Ed.2d 320 (1974) (Rail Act did not repeal the Tucker Act jurisdiction of Court of Claims). In that vein, the Court has stated that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974). *See Lovshin v. Department of the Navy*, 767 F.2d 826, 842 (Fed.Cir.1985) (elementary that repeals by implication are not favored and are permitted only to the extent of clear repugnancy). *Cf. Abbott Laboratories v. Gardner*, 387 U.S 136, 141, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967) (regarding the Administrative Procedure Act, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."); *Rosano v. Department of the Navy*, 699 F.2d 1315, 1318 n.13 (Fed.Cir.1983) (strong presumption against unreviewability in the absence of a specific congressional directive).

One of our predecessor courts recognized that there are "instances of partial repeal of the Tucker Act by laws expressly directing litigation of some class or kind elsewhere." *Fiorentino v. United States*, 607 F.2d 963, 969, 221 Ct.Cl. 545 (1979). The rule in *McClary* is an example of such an instance; that is, as to actions covered by the CSRA, Congress expressly directed litigation to the Board with judicial review, less certain exceptions, exclusively in the Federal Circuit. The same cannot be said regarding actions not covered by the CSRA; that is, Congress has not expressly directed litigation elsewhere.

Nevertheless, the government argues that this case is controlled by *United States v. Connolly*, 716 F.2d 882 (Fed.Cir.1983) (in banc). The government, however, misapprehends our holding in that case. The court held that the Claims Court had no Tucker Act jurisdiction over Connolly's claims not because the court's Tucker Act jurisdiction had been repealed but rather because Connolly, as an employeee of the Postal Service, was not in a position to invoke a substantive right grounded in a regulation of an executive department. *Connolly*, 716 F.2d at 885. "Only the regulations of an 'executive department' can form the basis of a regulatory claim cognizable under Tucker Act jurisdiction." *Id.* The clear import of that pronouncement is that the regulations of an executive department *can* form the basis for a regulatory claim cognizable under Tucker Act jurisdiction. Similarly, Connolly's Back Pay Act claim provided no jurisdiction because Connolly "failed to show that his separation from the Postal Service violated any relevant statute or regulation covered by the Tucker Act." *Id.* at 887. Likewise, Connolly's constitutional claim provided no jurisdiction for a back pay cause of action under the Tucker Act because no "money-mandating pay statute exists for Postal Service employees." *Id.*

In contrast, Fausto does invoke a right grounded in a regulation of an executive department as required by the Tucker Act and a money-mandating pay statute does exist for Department of the Interior employees like Fausto.

Therefore, Fausto's claim falls within the terms of the Tucker Act. Both the Supreme Court and this court have recognized that if "a claim falls within the terms of the Tucker Act, the United States has presumptively consented to suit." *United States v. Mitchell*, 463 U.S. 206, 216, 103 S.Ct. 2961, 2967, 77 L.Ed.2d 580 (1983), *quoted in United States v. Connolly*, 716 F.2d at 886. Thus, this is not a case where an existing remedial system is being "augmented by the creation of a new judicial remedy." *Bush v. Lucas*, 462 U.S. 367, 388, 103 S.Ct. 2404, 2416, 76 L.Ed.2d 648 (1983). Rather, this case merely recognizes the remedy under the Tucker Act and the Back Pay Act which Congress created many years ago. The correct inquiry is whether Congress has in the CSRA withdrawn the Tucker Act remedy that would otherwise exist. *See Regional Rail Reorganization Act Cases*, 419 U.S. at 126-27, 95 S.Ct. at 349-50. As to one in Fausto's situation, we conclude that Congress has not. If a federal civilian employee is granted rights by an executive department regulation and if that employee is accorded no right of redress by appeal to the Board under the CSRA, then the CSRA does not operate to repeal the Tucker Act/Back Pay Act jurisdiction of the Claims Court. We leave for another day whether this same rule applies to the vindication of rights granted by statute or by the Constitution. Accordingly, the Claims Court's decision that it lacked jurisdiction is reversed.

II

The Claims Court held in the alternative, assuming it did have jurisdiction, that Fausto had received all the back pay to which he was entitled. Fausto argues that he is entitled to back pay through February 1, 1983, the date the agency corrected his records. He also argues that he is entitled to back pay for the time during which he was constructively suspended, January 17, 1981, through February 15, 1981.

A

His first argument requires little discussion. The purpose of the Back Pay Act is "to compensate employees for pay which they would have earned but for the wrongful separation." *Everett v. United States*, 340 F.2d 352, 355, 169 Ct.Cl. 11 (1965). Notwithstanding the result that might obtain in a different factual setting, the factual setting here is controlled by *Kozak v. United States*, 458 F.2d 39, 198 Ct.Cl. 31 (1972). In that case, the court held that a former employee of the Library of Congress who arbitrarily had been denied his assignment rights in a reduction in force was entitled to back pay to the date the library division in which he had been employed was abolished. Just as Kozak's recovery could not extend beyond the date his division was abolished, so Fausto's recovery can not extend beyond September 18, 1981, the date his camp was officially closed.

B

Fausto's other argument has stronger support. One of this court's predecessors has held that an unlawful administrative action depriving a claimant of a procedural right voids the action and leaves the employee entitled to his pay otherwise due *until* proper procedural steps are taken toward disciplining him. *Garrott v. United States*, 340 F.2d 615, 622, 169 Ct.Cl. 186 (1965); *see also Hanifan v. United States*, 354 F.2d 358, 364, 173 Ct.Cl. 1053 (1965) (preference eligible employee deprived of procedural right must be regarded as not yet lawfully removed and thus entitled to his pay otherwise due). Applying those principles to this case compels the conclusion that Fausto was effectively on the rolls (not exceeding the date his job was

abolished) *until* proper procedural steps were taken, and is entitled to his pay otherwise due, that is, for the period of his constructive suspension.

This is entirely consistent with *Gratehouse v. United States*, 512 F.2d 1104, 206 Ct.Cl. 288 (1975). In that case the court observed that the consequences of a refusal to accept an agency's offer to remedy a procedural error depended on the circumstances, noting that an agency has the inherent power to reconsider and change a decision if it does so within a reasonable period of time. "What is a short and reasonable time period will vary with each case, but absent unusual circumstances, the time period would be measured in weeks, not years." *Id.* 512 F.2d at 1109. Here the agency's reconsidered decision was issued one and one-half years after its original decision. The government has not argued that unusual circumstances existed, and our review of the record reveals none. Indeed, it appears from the record that the agency's belated recognition of Fausto's regulatory rights resulted from his own efforts. On the facts of this case we conclude that a reasonable time for reconsideration has expired, and the agency no longer had the opportunity to correct the procedural error retroactively. *See id.* Accordingly, Fausto (until his camp was closed) "in effect was never separated and never stopped drawing his pay." *Id.* at 1110.

The decision of the Claims Court is reversed and the case is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 85-2272
103-83-C

JOSEPH A. FAUSTO, APPELLANT,

v.

THE UNITED STATES, APPELLEE.

JUDGMENT

ON APPEAL from the United States Claims Court. This CAUSE having been heard and considered, it is ORDERED AND ADJUDGED.

REVERSED AND REMANDED TO THE CLAIMS COURT FOR PROCEEDINGS CONSISTENT WITH THE OPINION OF THIS COURT.

DATED February 10, 1986

Entered By Order of The Court

Francis X. Gindhart, *Clerk*

/s/ FRANCIS X. GINDHART

APPENDIX C

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

Appeal No. 85-2272

JOSEPH A. FAUSTO, APPELLANT

v.

THE UNITED STATES, APPELLEE

May 14, 1986

ON SUGGESTION FOR REHEARING IN BANC

ORDER

Before RICH, BALDWIN, and BISSELL, Circuit Judges.

BISSELL, Circuit Judge.

Following this court's original decision in this appeal, *Fausto v. United States*, 783 F.2d 1020 (Fed.Cir.1986), the government filed a suggestion that the case be reheard by the court in banc. The basis for the suggestion is the government's belief that

> the panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedent of this circuit: *Block v. Community Nutrition Institute*, [467 U.S. 340,] 104 S.Ct. 2450 [81 L.Ed.2d 270] (1984); *Bush v. Lucas*, 462 U.S. 367 [103 S.Ct. 2404, 76 L.Ed.2d 648] (1983); *United States v. Erika, Inc.*, 456 U.S. 201 [102 S.Ct. 1650, 72

> 72 L.Ed.2d 12] (1982); *United States v. Connolly*, 716 F.2d 882 (Fed.Cir.1983) (*en* [*sic*] *banc*), *cert. denied*, [465 U.S. 1065] 104 S.Ct. 1414 [79 L.Ed.2d 740] (1984).

"A majority of the circuit judges who are in regular active service" have not ordered that the appeal be reheard by the court in banc. *See* Federal Rules of Appellate Procedure 35. However, because of the importance of the issue the panel will treat the suggestion as a petition for rehearing.

There has been no oral argument on the suggestion and Fausto, *pro se*, has not been ordered to respond to the government's brief. The panel has carefully reviewed the arguments and the authority cited in the government's brief. We conclude that the panel's original decision is not contrary to the precedent of the Supreme Court, nor of this court, and is not in confict with the decisions of the regional circuits.

The government presents two questions for our review:

> 1. Whether the comprehensive remedial scheme established by Congress in the Civil Service Reform Act of 1978, Pub.L. No. 95-454, 92 Stat. 1111 (CSRA), precludes review of claims of former federal employees for back pay by the United States Claims Court under the Tucker Act.
>
> 2. Whether, prior to the enactment of the CSRA, there would have been jurisdiction under the Tucker Act to entertain Mr. Fausto's claim.

We first address the latter question.

I *The Tucker Act*

In its original opinion, this panel observed: "There is no doubt that prior to the CSRA an employee in Fausto's situation could have maintained a suit in the Court of Claims." *Fausto*, 783 F.2d at 1021. The goverment argues

to the contrary that even if the CSRA had not been enacted Fausto "would not have had a Tucker Act cause of action."

First, the government argues that Fausto's removal did not violate any agency regulation. It is the goverment's position that the regulations which the agency violated, the grievance regulations, do not prescribe procedures that must be followed prior to removal. According to the government, "those regulations did not prescribe any pre-removal procedures," they only provided "that, *after* certain excepted service employees have been removed from their positions, they may file grievances to contest the validity of removal actions." [Emphasis in original.] We do not agree. The government is simply incorrect, the regulations do not require that grievances be filed only after the removal. Indeed, the regulations require that "[f]ormer employees must file a timely grievance concerning a matter appropriate for review under these procedures prior to separation in order to receive consideration." 370 DM 771.3.3B. Fausto clearly had the right to file his grievance before he was removed.

Second, the government argues that the grievance regulations would not have provided a basis for a Tucker Act suit because "the grievance regulations do not provide for the payment of compensatory damages." As support for that proposition the government cites *United States v. Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976), and *Spagnola v. Stockman*, 732 F.2d 908 (Fed.Cir.1984). However, the government has misread its authority.

> The Supreme Court observed that [t]he Tucker Act, of course, is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages.
>
> . . . .
>
> . . . It follows that the asserted entitlement to money damages depends upon whether any federal statute

> "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Eastport S.S. Corp. v. United States*, 178 Ct.Cl. [599,] 607, 372 F.2d [1002,] 1009 [1967]. . . .
>
> . . . .
>
> . . . Where the United States is the defendant and the plaintiff is not suing for money improperly exacted or retained, the basis of the federal claim—whether it be the Constitution, a statue, or a regulation—does not create a cause of action for money damages unless, as the Court of Claims has stated, that basis "in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Eastport S.S. Corp. v. United States*, 178 Ct.Cl. at 607, 372 F.2d at 1008, 1009.

Testan, 424 U.S. at 398, 400-402, 96 S.Ct. at 954-955. The basis for the Tucker Act suit here is not the grievance regulation but the Back Pay Act. That statute "does authorize retroactive recovery of wages whenever a federal employee has 'undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the compensation to which the employee is otherwise entitled. 5 U.S.C. § 5596(b)." *Testan*, 424 U.S. at 405, 96 S.Ct. at 956. There is no dispute that Fausto has been affected by such a personnel action—the agency has admitted as much. In this circumstance, the statute "was intended to grant a monetary cause of action." *Testan*, 424 U.S. at 407, 96 S.Ct. at 957. Furthermore, this case is distinct from both *Spanola v. Stockman*, 732 F.2d 908 (Fed.Cir.1984) (employee detailed to perform duties of higher-level position without additional compensation) and *United States v. Connolly*, 716 F.2d 882 (Fed.Cir.1983) (in banc) (as employee of Postal Service no statutory basis for pay), because in those cases there was no provision of law mandating payment of money.

II *The CSRA*

With respect to the panel's evaluation of the effect of the CSRA on the Tucker Act remedy otherwise available, the government asserts that "the enactment of the CSRA precludes direct judicial review of personnel claims by federal employees that are not subject to review under the remedial scheme of the CSRA." This proposition is said to be supported by the "overwhelming weight of appellate authority" in the Supreme Court, in this circuit, and in the regional circuits. We have carefully reviewed all the cited authority as well as the authority disclosed in our own research. We conclude that the panel's original decision is not contrary to the precedent in the Supreme Court, is fully consistent with the precedent of this circuit, and is not inconsistent with the decisions of the regional circuits (the apparent conflict, on thoughtful analysis, being no conflict at all).

Chapter 75 of the CSRA addresses adverse actions. The relevant portions of the CSRA, codified at 5 U.S.C. §§ 7511-7513 (1982), delineate certain rights provided to an "employee," as defined in § 7511. Deleting restrictions not pertinent to this discussion, for purposes of this portion of the CSRA an employee is defined to include "an individual in the competitive service" and "a preference eligible in an Executive agency in the excepted service." § 7511(a)(1). Fausto is not in the competitive service; he is in the excepted service. And although he is in an executive agency he is not a preference eligible. Accordingly, he is not an employee as defined in § 7511; he is not subject to the adverse action provisions of the CSRA. Consequently, we see no basis for the government's apparent concern that this decision will have an effect on those persons who are indeed subject to the adverse action provisions of the CSRA. This case deals solely with a person in an executive agency in the excepted service who is not a preference eligible. Moreover, there has been no argument about and we

do not address whether, in the absence of the agency regulation, Fausto "as an [excepted service] employee, could have been summarily discharged by the [agency] at any time without the giving of a reason." *Vitarelli v. Seaton*, 359 U.S. 535, 539, 79 S.Ct. 968, 972, 3 L.Ed.2d 1012 (1959).

A. *Supreme Court Precedent*

In *Block v. Community Nutrition Institute*, 467 U.S. 340, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984), the Supreme Court considered whether ultimate consumers of dairy products could obtain judicial review of milk market orders issued by the Secretary of Agriculture pursuant to an act of Congress. The Court concluded that consumers could not obtain judicial review of the orders. The analysis in *Community Nutrition* may support the proposition that employees subject to the adverse action provisions of the CSRA are precluded from direct judicial review but it is no support for the proposition that the CSRA has silently repealed a remedy for persons the CSRA does not cover. Recognizing that a Tucker Act remedy is still available to persons like Fausto who are not covered by the CSRA will in no way frustrate the statutory purpose of the CSRA, it will not undermine the congressional preference for an administrative remedy, *see McClary v. United States*, 775 F.2d 280 (Fed.Cir.1985) (employee with right to appeal to MSPB has no independent cause of action in Claims Court), and it will not disrupt administration of the congressional scheme. *See Community Nutrition*, 467 U.S. at 352, 103 S.Ct. at 2458. Those dangers might exist if the result of this case were to allow parallel proceedings to progress at the same time, *i.e.*, if there were an alternative route for those covered by the CSRA. But that is *not* the result. Indeed, barring judicial review here on the government's theory would mean there is " 'no forum' in which

[the agency's] actions could or would be challenged." *Id.* Preclusion of such suits does pose a direct threat to realization of the statutory objectives of the Tucker Act and the Back Pay Act; those objectives with respect to persons like Fausto would no longer be realized through the specific remedy provided by Congress.

In *United States v. Erika, Inc.*, 456 U.S. 201, 102 S.Ct. 1650, 72 L.Ed.2d 12 (1982), the question was whether the Court of Claims had Tucker Act jurisdiction to review determinations by private insurance carriers of the amount of benefits payable under Part B of the Medicare statute. The court held that the Medicare statute "specifically precluded review in the Court of Claims." *Id.* at 206, 102 S.Ct. at 1653. The Court observed that Congress "explicitly" addressed disputes regarding benefits by specifically providing for layers of administrative review and granting judicial review "in two instances only," entitlement to benefits under Part A or Part B, and amount of benefits under Part A. *Id.* at 207, 102 S.Ct. at 1654. "Conspicuously, the statute fails to authorize further review for determinations of the amount of Part B awards." *Id.* at 208, 102 S.Ct. at 1654. It was in that context that the "omission provides persuasive evidence that Congress deliberately intended to foreclose further review." *Id.* Moreover, there was legislative history expressly stating the intent to bar judicial review of Part B disputes of this nature. H.R.Conf.Rep. No. 92-1605, p. 61 (1972) ("no authorization for an appeal to the Secretary or for judicial review on matters solely involving amounts of benefits under Part B").

In both *Community Nutrition* and *Erika* there was no jurisdiction because the very statute asserted to provide the substantive right relied on was instead interpreted to prohibit judicial review of its own provisions. The Court did not hold in either case that the relevant statute had repealed a substantive right granted in a different statute. It is essential to a proper understanding of this case to recognize that the issue is *not* whether the CSRA *authorizes* judicial review for persons in the excepted service. The issue is *not* whether persons in the excepted service are entitled to the protection afforded other federal workers by the CSRA. The issue is *not* whether the CSRA grants persons in the excepted service some kind of private right of action. Fausto makes no claim of entitlement under the CSRA and we do not resolve that issue in this case. The issue in this case is whether one act of Congress, the CSRA, has silently repealed other acts of Congress, the Tucker Act and the Back Pay Act. The government asserts that it has. But its arguments, though appearing persuasive, are superficial and fail to directly address the issue. The thrust of its arguments, of its authority in the Supreme Court and in this circuit and in the other circuits, is that persons in the excepted service have no cause of action under the provisions of the CSRA and in that sense the CSRA does not authorize suit; that is to say, the government explains, the CSRA "precludes" judicial review and therefore, the government concludes, the CSRA bars judicial review under any basis in any forum.

Again, that is *not* the situation here. Whether the CSRA provides a basis for a cause of action for, or whether the CSRA instead precludes judicial review of, issues which the CSRA does cover is not at all the issue here. Neither *Community Nutrition* nor *Erika* supports the proposition that omission of any mention of an issue in one statute operates to repeal the grant of judicial review of that issue contained in a different statute. For example, the government does not argue that the CSRA bars judicial review for persons in the military or for civil servants employed by the legislative or judicial branches. Federal workers not included in the CSRA Chapter 75 definition of employee have found their claims sometimes rejected and sometimes

accepted by the courts, but the courts' decisions have turned on considerations wholly apart from the CSRA. *See, e.g., Browning v. Clerk, United States House of Representatives*, 789 F.2d 923, (D.C.Cir.1986) (discharge of official reporter employed by House of Representatives; not justiciable because of the Speech or Debate Clause); *Walker v. Jones*, 733 F.2d 923 (D.C.Cir.1984) (discharge of manager of House of Representatives' restaurants not shielded from court consideration by Speech or Debate Clause); *Mulholland v. United States,* 5 Cl.Ct. 531 (1984) (involuntary release of enlisted member of Army reserve; released resolved on merits); *cf. Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) (discharged deputy administrative assistant to Member of Congress has a cause of action implied from the Due Process Clause); *Hurick v. Lehman*, 782 F.2d 984 (Fed.Cir.1986) (complaint seeking reversal of discharge from Navy and award of all emoluments states a claim for money damages over which Little Tucker Act gives district court jurisdiction).

In *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983) a competitive service employee who had been improperly demoted for publicly criticizing his agency and who had prevailed in his administrative appeal, gaining restoration and backpay, sought a new nonstatutory damages remedy against his superior for violation of his first amendment rights. The question was "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy." *Id.* at 388, 103 S.Ct. at 2416. Expressing a concern about "the addition of another remedy," *id.*, and "the impact of a new species of litigation between federal employees on the efficiency of the civil service," *id.* at 389, 103 S.Ct. at 2417, the Court declined

to create a new remedy. "Because such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, we conclude that it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy." *Id.* at 368, 103 S.Ct. at 2406.

Contrary to the government's argument here, the panel's decision is fully consistent with *Bush*. First, the panel's decision creates no "new judicial remedy." The remedy which Fausto seeks and which the panel approves is a statutory remedy. Furthermore, it is an old and thoroughly tested remedy; unlike the remedy Bush sought, the remedy approved here will not spawn "a new species of litigation." Second, absent the remedy sought here for persons in the excepted (as distinct from the competitive) service, there are no "meaningful remedies against the United States." Indeed, notwithstanding the existence of a valid agency regulation granting certain rights to Fausto and the agency's admitted violation of that regulation and the existence of Supreme Court case law binding the agency to abide its own regulation, *Vitarelli v. Seaton,* 359 U.S. 535, 539-40, 79 S.Ct. 968, 972-73, 3 L.Ed.2d 1012 (1959); *Service v. Dulles*, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957), the government asserts that for persons in Fausto's circumstance there is not *any* review in *any* forum (administrative or judicial). We reject that argument.

The Court observed that "[f]ederal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be redressed." *Bush v. Lucas*, 462 U.S. at 385, 103 S.Ct. at 2415. The Court recognized that one component of that scheme was the Back Pay Act, which the Court described

as "extending the right to backpay and lost benefits to every employee affected by a personnel action subsequently found to be unjustified." *Id.* at 385 n. 25, 103 S.Ct. at 2415 n. 25. Our holding that Fausto is protected by the Back Pay Act is not contrary to Supreme Court precedent.

B. *Federal Circuit Precedent*

The government argues that, contrary to the panel's original decision, this court's decision in *United States v. Connolly,* 716 F.2d 882, 886 (Fed.Cir.1983) (in banc), "mandates the result reached by the Claims Court and that we urge here." However, a careful reading of that case reveals that it mandates no such result.

First, in the section of the opinion the government quotes, section III, the court was addressing whether Connolly had "no right *under the Civil Service Reform Act* to seek review of his dismissal in the Claims Court." *Connolly*, 716 F.2d at 886 (emphasis added). That is not, it bears repeating, the issue here. The court's discussion of that issue is replete with references to rights that were or were not granted by the CSRA:

> The Reform Act . . . deliberately precluded such review *under that Act* for probationary employees. . . . The statutory definition of "employee" denotes the only class of civil service workers entitled to procedural and appeal rights *provided by the Act* . . . [C]ourts have concluded that probationary employees may not appeal adverse actions *under the Act.*
>
> . . .
>
> We think that the legislative history of the Reform Act entirely forecloses the possibility that probationary employees have some sort of unspecified

> private right of action in the Claims Court *under the Act* to seek judicial review of their removals.
>
> . . .
>
> . . . [w]e find it incongruous to suppose that [a probationary employee] has an implied private right of action *under the Civil Service Reform Act* to seek judicial review of his dismissal.

Id. (emphasis added). It was in that context that the court concluded: "Congress has decided against judicial review *in the Reform Act*, and we are not free to disturb that judgment." *Id.* (emphasis added). That conclusion was directed to whether the CSRA granted to probationary employees a cause of action *under that act*; the court's conclusion did not address whether the CSRA had repealed the cause of action which Congress had granted in the Tucker Act/Back Pay Act.

Second, even if the court's discussion could be construed to address a repeal of the Tucker Act/Back Pay Act, *Connolly* is distinguishable because the court in *Connolly* relied on language in the legislative history which specifically revealed the intent of Congress not to grant a cause of action under the CSRA to probationary employees like Connolly. *Cf. Erika*, 456 U.S. at 207, 211, 102 S.Ct. at 1653, 1655 (Medicare statute *specifically* precluded review in the Court of Claims; "expressions of legislative intent unambiguously support" Court's reading of the statutory language). The government had cited no legislative history of the CSRA expressing a comparable intent of Congress with respect to persons in the excepted service like Fausto.

C. *Regional Circuit Decisions*

The government asserts that the "weight of appellate authority . . . holds that the enactment of the CSRA precludes direct judicial review of personnel claims by federal employees that are not subject to review under the

remedial scheme of the CSRA." We have carefully reviewed the cases cited by the government. Those cases are not in conflict with the panel's decision.

In all of the government's cited cases, the employee was subject to the adverse action provisions of the CSRA and was seeking some sort of additional remedy. *Pinar v. Dole*, 747 F.2d 899 (4th Cir.1984) (two day suspension of competitive service employeee; no jurisdiction under the provisions of the Administrative Procedures Act); *Broadway v. Block*, 694 F.2d 979 (5th Cir.1982) (reassignment of competitive service employee; no *Bivens* cause of action and no APA jurisdiction); *Braun v. United States*, 707 F.2d 922 (6th Cir.1983) (whistleblower; no first amendment cause of action); *Schrachta v. Curtis*, 752 F.2d 1257 (7th Cir.1985) (denial of transfer or promotion; no implied private right of action in the CSRA); *Veit v. Heckler*, 746 F.2d 508 (9th Cir.1984) (career employee's performance rating; no private cause of action under the CSRA and no APA jurisdiction); *Weatherford v. Dole*, 763 F.2d 392 (10th Cir.1985) (reassignment; no jurisdiction under 28 U.S.C. § 1331); *Hallock v. Moses*, 731 F.2d 754 (11th Cir.1984) (transfer of employee who failed to exhaust her remedies under federal statutes and grievance procedures; failure to state a claim); *Carducci v. Regan*, 714 F.2d 171 (D.C.Cir.1983) (reassignment of tenured employee; no APA jurisdiction). That is not the circumstance in this case. Although the agency imposed on Fausto the most severe form of personnel action, removal, he was not subject to the adverse action provisions of the CSRA because he was in the excepted service.

III *Conclusion*

For three decades it has been the well settled law "that an employing agency must comply with a regulation which it considered important enough to promulgate in the first place." *Watson v. United States*, 142 Ct.Cl. 749, 756, 162

F.Supp. 755 (1958). In the Tucker Act and the Back Pay Act, Congress provided a remedy for a federal employee whose agency admittedly did not comply with its own regulation in removing him. For an employee in such a circumstance, the panel originally held, the CSRA did not eliminate the previously existing remedy. The court is not free to dismantle what Congress has so carefully constructed.

The government's suggestion for rehearing in banc is declined. Treating the suggestion as a petition for rehearing, rehearing has been granted to the extent that we have reconsidered our original decision and is otherwise denied.

APPENDIX D

UNITED STATES CLAIMS COURT

No. 103-83C

JOSEPH A. FAUSTO

v.

UNITED STATES

Feb. 28, 1985

OPINION

SETO, Judge.

In this civilian pay case, plaintiff seeks to recover back pay allegedly owed to him as a result of the Fish & Wildlife Service's termination of his employment. The underlying issue is whether the Civil Service Reform Act of 1978 establishes so comprehensive a scheme for the review of federal employee personnel actions as to preclude jurisdiction in this court under the Back Pay Act. For the reasons stated below, defendant's cross-motion for summary judgment is granted.

FACTS

Plaintiff, Joseph Fausto, was hired on January 8, 1978, by the U.S. Department of the Interior Fish and Wildlife Service ("FWS"), as an Administrative Officer for the Back Bay Young Adult Conservation Corps ("Back Bay") camp in Virginia Beach, Virginia. Plaintiff's position as an "excepted service," term employee was to last no longer than the earlier of either the termination of the Back Bay program, or September 30, 1982.

On November 21, 1980, plaintiff was advised that the FWS intended to terminate his employment for cause. The allegations against plaintiff included, inter alia, the unauthorized use of a government vehicle. Plaintiff replied to the charges against him on December 18, 1980. After considering all of the evidence, the FWS removed plaintiff from his position on January 16, 1981.

The FWS permanently closed the Back Bay camp on September 18, 1981. After admitting that plaintiff had not been apprised of his grievance rights, however, the FWS provided plaintiff the opportunity to challenge his removal. Plaintiff thereafter filed a formal grievance with the Department of the Interior.

On June 30, 1982, Mr. Ashe, the Deputy Regional Director of the FWS, concluded that plaintiff should not have been removed from his position. However, he also found that a 30-day suspension without pay for the unauthorized use of a government vehicle was warranted. The other charges were viewed as *de minimis* and not supportive of any penalty. On behalf of the FWS, Mr. Ashe offered, and plaintiff accepted, back pay from February 15, 1981, the date plaintiff's 30-day suspension would have ended, until September 18, 1981, the date the Back Bay camp was officially closed. Alleging that this relief was inadequate, plaintiff pursued his claim to the Department of the Interior's Office of Hearings and Appeals and, ultimately, to the Secretary of the Interior. At each stage, the FWS decision was upheld.

On February 1, 1983, the FWS officially noted plaintiff's suspension and subsequent involuntary termination due to the September 18, 1981, closing of the Back Bay camp. On February 28, 1983, plaintiff filed this action alleging jurisdiction under the Back Pay Act seeking back pay, beyond that he has already received, for both the period of his allegedly unwarranted suspension and a

period beyond his termination of September 18, 1981. This case is presently before the court on cross-motions for summary judgment.

DISCUSSION

Although plaintiff asserts jurisdiction under the Back Pay Act, 5 U.S.C. § 5596 (1982), defendant argues that the Civil Service Reform Act of 1978 ("CSRA"), Pub. L. No. 95-454, 92 Stat. 1111 (1978) prevents this court from acquiring jurisdiction over plaintiff's claim. In particular, defendant contends that the CSRA enumerates an all-inclusive catalogue of remedies for adverse personnel actions and therefore impliedly precludes judicial review of federal employee claims in the U.S. Claims Court, or any other judicial forum. Plaintiff rejoins that the Back Pay Act may provide an independent basis for jurisdiction in this court, despite the sweeping mandate of the CSRA.

It is well-settled that the CSRA, which effected an extensive reorganization of the civil service system, establishes a comprehensive scheme for review of federal employee personnel actions. That comprehensive scheme contemplates that for major personnel actions ("adverse actions"), direct judicial review be available only *after* extensive prior administrative proceedings. *See Carducci v. Regan*, 714 F.2d 171, 174-175 (D.C.Cir.1983). As the Claims Court noted: "In establishing the Merit Systems Protection Board, Congress created a system whereby personnel actions which are to be reviewed outside the employing agency are first considered within the executive branch and reach the federal courts at the appellate level on the basis of the administrative record." *Connolly v. United States*, 1 Cl.Ct. 312, 319, 554 F.Supp. 1250 (1982), *aff'd in part, United States v. Connolly*, 716 F.2d 882 (Fed.Cir.1983).

Since the *Connolly* decision, the Claims Court has held on several occasions that an employee's right to seek review of an adverse action must be found, if at all, in the CSRA. For example, in *McGee v. United States*, 5 Cl.Ct. 480 (1984), a temporary employee who could not appeal to the Merit Systems Protection Board under the CSRA sought judicial review of his discharge in the Claim Court. The court held that because "the remedies under the Civil Service Reform Act are all-inclusive, this court also has no jurisdiction to review plaintiff's dismissal." *Id.* at 481; *But see Kennedy v. United States*, 5 Cl.Ct. 792 (1984) (the enactment of the CSRA did not abrogate the Claims Court's jurisdiction over cases where a statutorily created substantive right is allegedly unconstitutionally violated and where no other review is specifically provided for under the CSRA).

In the instant case, appeal to the Merit Systems Protection Board was not available to plaintiff. *See Fausto v. U.S. Department of the Interior*, 738 F.2d 454 (Fed.Cir.1984). Accordingly, we interpret the CSRA as comprising a comprehensive catalogue of remedies for adverse personnel actions, and therefore find that plaintiff may not assert jurisdiction under the Back Pay Act for review of his claims in this court.

Even assuming, arguendo, that plaintiff could assert jurisdiction under the Back Pay Act, he would not be entitled to the relief requested. Plaintiff claims that he is entitled to back pay from January 17, 1981 through February 1, 1983. Defendant contends that plaintiff has been compensated for the entire period of his wrongful removal, i.e., from the end of his suspension until the Back Bay camp was closed, and that plaintiff is not entitled to any further compensation.

It is well-established that a wrongfully separated government employee shall receive all pay and benefits he is entitled to for the period of his wrongful discharge.

5 U.S.C. § 5596(b)(1) (1982); *See Sampson v. Murray*, 415 U.S. 61, 75, 94 S.Ct. 937, 945, 39 L.Ed.2d 166 (1974). That requirement, however, has been met in the instant case. In this regard, the court's reasoning and holding in *Kozak v. United States*, 198 Ct.Cl. 31, 458 F.2d 39 (1972), is instructive. In *Kozak*, plaintiff was wrongfully separated from a division within the Library of Congress. The court limited Kozak's recovery of back pay to the date on which his division was abolished. The court reasoned that since Kozak's retention rights were limited to his division, there was no possibility that his job could have continued beyond the division's termination, and that his entitlement to back pay ended when his division was abolished. *Kozak*, 198 Ct.Cl. at 37, 458 F.2d at 41-42.

Plaintiff was an excepted-service, term employee with no retention rights, *see* Defendant's Cross-Motion Attachments D and F, whose employment with the FWS could last no longer than the duration of the Back Bay program. Therefore, plaintiff's rights to, and benefits of, employment ceased with the September 18, 1981, closing of the Back Bay camp. Thus, even if no disciplinary action had been taken by the FWS on plaintiff's case, his entitlement to pay would have ended on September 18, 1981. The fact that certain disciplinary action was taken, does not change the result. Accordingly, plaintiff cannot recover back pay beyond September 18, 1981.

Although plaintiff received back pay for the period February 15, 1981, to September 18, 1981, he contends that because his suspension was unwarranted, he should receive compensation for the period from January 17—February 14, 1981, as well. We do not agree. Because plaintiff admits that he willfully misused a government vehicle, *see* Defendant's Cross-Motion Attachment C, he is subject to a statutorily mandated suspension without pay for not less than one month. 31 U.S.C. § 638a(c)(2)(1976) (current version at 31 U.S.C. § 1349(b)

(1982)); *See Devine v. Nutt*, 718 F.2d 1048, 1055 (Fed.Cir.1983). Therefore, we find that the imposition of a 30-day suspension was proper and that plaintiff is not entitled to back pay for the period of this suspension. *See Clark v. United States*, 162 Ct.Cl. 477, 486-487 (1963).

CONCLUSION

For the reasons presented herein, we conclude that this court does not have jurisdiction to review plaintiff's claims. In the alternative, we find that plaintiff has recovered all back pay to which he is entitled. Therefore, any procedural transgression by the government in handling plaintiff's administrative appeal is deemed to be harmless error. Accordingly, defendant's cross-motion for summary judgment is GRANTED, plaintiff's motion for summary judgment is DENIED, and plaintiff's complaint is to be DISMISSED.

APPENDIX E

STATUTES INVOLVED

CHAPTER 23 – MERIT SYSTEM PRINCIPLES

§ 2302. Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section –

(A) "personnel action" means –

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evalution under chapter 43 of this title;

(ix) a decision concerning pay, benefits, or awards, concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and

(x) any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level;

with respect to an employee in, or applicant for, a covered position in an agency;

(B) "covered position" means any position in the competitive service, a career appointee position in the

Senior Executive Service, or a position in the excepted service, but does not include –

(i) a position which is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) any position excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration.

* * * * *

CHAPTER 43 – PERFORMANCE APPRAISAL

SUBCHAPTER I – GENERAL PROVISIONS

§ 4301. Definitions

For the purpose of this subchapter –

* * * * *

(2) "employee" means an individual employed in or under an agency, but does not include –

(A) an employee outside the United States who is paid in accordance with local native prevailing wage rates for the area in which employed;

(B) an individual in the Foreign Service of the United States;

(C) a physician, dentist, nurse, or other employee in the Department of Medicine and Surgery, Veterans' Administration whose pay is fixed under chapter 73 of title 38;

(D) an administrative law judge appointed under section 3105 of this title;

(E) an individual in the Senior Executive Service;

(F) an individual appointed by the President; or

(G) an individual occupying a position not in the competitive service excluded from coverage of this subchapter by regulations of the Office of Personnel Management; and

(3) "unacceptable performance" means performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position.

§ 4303. Actions based on unacceptable performance

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b)(1) An employee whose reduction in grade or removal is proposed under this section is entitled to—

(A) 30 days' advance written notice of the proposed action which identifies—

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which—

(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

(c) The decision to retain, reduce in grade, or remove an employee—

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee—

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

(B) for which the notice and other requirements of this section are complied with.

(d) If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A) of this section, any entry or other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.

(e) Any employee who is a preference eligible or is in the competitive service and who has been reduced in grade or

removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701 of this title.

(f) This section does not apply to–

(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title,

(2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less, or

(3) the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions.

* * * * *

CHAPTER 75–ADVERSE ACTIONS

SUBCHAPTER I–SUSPENSION FOR 14 DAYS OR LESS

§ 7501. Definitions

For the purpose of this subchapter–

(1) "employee" means an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less[.]

§ 7502. Actions covered

This subchapter applies to a suspension for 14 days or less, but does not apply to a suspension under section 7521

or 7532 of this title or any action initiated under section 1206 of this title.

§ 7503. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service (including discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period or any other pattern of discourteous conduct).

(b) An employee against whom a suspension for 14 days or less is proposed is entitled to–

(1) an advance written notice stating the specific reasons for the proposed action;

(2) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) Copies of the notice of proposed action, the answer of the employee if written, a summary thereof if made orally, the notice of decision and reasons therefor, and any order effecting [*sic*] the suspension, together with any supporting material, shall be maintained by the agency and shall be furnished to the Merit Systems Protection Board upon its request and to the employee affected upon the employee's request.

SUBCHAPTER II – REMOVAL, SUSPENSION FOR MORE THAN 14 DAYS, REDUCTION IN GRADE OR PAY, OR FURLOUGH FOR 30 DAYS OR LESS

§ 7511. Definitions; application

(a) For the purpose of this subchapter –

(1) "employee" means –

(A) an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less; and

(B) a preference eligible in an Executive agency in the excepted service, and a preference eligible in the United States Postal Service or the Postal Rate Commission, who has completed 1 year of current continuous service in the same or similar positions;

* * *

(b) This subchapter does not apply to an employee –

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by –

(A) the Office of Personnel Management for a position that it has excepted from the competitive service; or

(B) the President or the head of an agency for a position which is excepted from the competitive service by statute.

(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office.

§ 7512 Actions covered

This subchapter applies to –

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to –

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1206 or 7521 of this title.

§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to –

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter,

* * * * *

CHAPTER 77—APPEALS

§ 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. * * *

* * * * *

§ 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. * * *

U.S. GOVERNMENT PRINTING OFFICE: 1986—491-507/20322

OPPOSITION

BRIEF

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(9)

fil
NOV 26 PAGE 17
SAC
N/A
1/1

ORIGINAL

RECEIVED
HAND DELIVERED
OFFICE OF THE CLERK
SUPREME COURT, U.S

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

Supreme Court, U.S.
FILED
NOV 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-595

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH A. FAUSTO

No.

JOSEPH A. FAUSTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND AFFIDAVIT IN SUPPORT OF MOTION

MOTION

Pursuant to Rule 46 of the Supreme Court of the United States, the respondent and cross-petitioner, Joseph A. Fausto, moves for leave to proceed in this case in forma pauperis. Respondent/cross-petitioner was granted leave to so proceed in both the United States Claims Court and the United States Court of Appeals for the Federal Circuit. Respondent/cross-petitioner's affidavit in support of this motion directly follows.

Respectfully submitted,

Joseph A. Fausto

Joseph Anthony Fausto

1111 Arlington Boulevard
W-310
Arlington, Virginia 22209

(703) 528-2746

Appearing pro se

November 17, 1986

AFFIDAVIT

I, Joseph Fausto, being first duly sworn according to law, depose and say that I am the respondent and cross-petitioner in the above-entitled cases; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe that I am entitled to redress.

I further swear that the information below relating to my ability to pay the cost of proceeding in this Court, in the form of responses to questions contained in Federal Rules of Appellate Procedure Form 4, are true:

1. I am currently employed by the United States Department of Agriculture, Washington, D.C., as a budget analyst. I earn approximately $2,000 per month before taxes.

2. Within the past twelve months, I have received no income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, or dividends.

3. I own a checking and savings account, the total current value of which is approximately $140.

4. I own no real estate, stocks, bonds, notes, automobiles, or other valuable property.

5. The following persons are dependent upon me for support: Emily Ann Fausto, wife; Joseph Anthony Fausto, son; Edward James Fausto, son.

I understand that a false statement in this affidavit will subject me to penalties of perjury.

Joseph A. Fausto

Subscribed and Sworn to Before
me this seventeenth day of November, 1986

Notary Public

My commission expires: My Commission Expires January 14, 1991

PAUPERIS AND AFFIDAVIT IN SUPPORT OF MOTION, BRIEF FOR THE RESPONDENT IN OPPOSITION (No. 86-595), and PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT on counsel for the government by enclosing a copy thereof in an envelope, first class postage prepaid, addressed to:

The Honorable Charles Fried
Solicitor General of the United States
United States Department of Justice
Washington, D.C. 20530

and depositing same in the United States mails at Washington, D.C. on November 17, 1986.

Joseph A. Fausto

Subscribed and Sworn to Before
me this seventeenth day of November, 1986

Notary Public

My commission expires: My Commission Expires January 14, 1991

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. 86-595

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH A. FAUSTO

No.

JOSEPH A. FAUSTO, PETITIONER

v.

UNITED STATES OF AMERICA

PROOF OF SERVICE

STATE OF _____)
DISTRICT OF COLUMBIA) ss.:
COUNTY OF _____)

JOSEPH FAUSTO, after being duly sworn, deposes and says that pursuant to Rule 28.4(a) of this Court he served the within MOTION FOR LEAVE TO PROCEED IN FORMA

No. 86-595

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH A. FAUSTO

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT
IN OPPOSITION

Joseph Anthony Fausto

1111 Arlington Boulevard
W-310
Arlington, Virginia 22209

(703) 528-2746

Appearing pro se

QUESTION PRESENTED

The Tucker Act, 28 U.S.C. 1491, provides a remedy, including judicial review in the United States Claims Court, for any claim against the United States founded upon any regulation of an executive department. The question presented is whether federal career tenured employees in the excepted service (who are not covered by the remedies provided in the Civil Service Reform Act of 1978) who are discharged in violation of valid departmental regulations may obtain judicial review of their discharges under the Tucker Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement	3
Reasons for denying the petition	8
Conclusion	21
Appendix A	1a
Appendix B	3a

TABLE OF AUTHORITIES

Cases:

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 . 13-14

Carducci v. Regan, 714 F.2d 171 12

Kotarski v. Cooper, 799 F.2d 1342 11,13,14

Regional Rail Reorganization Act Cases, 419 U.S. 102 16

Service v. Dulles, 354 U.S. 363 10,16-17

United States v. Mitchell, 463 U.S. 206 10

Veit v. Heckler, 746 F.2d 508 11,13

Cases - Continued: Page

Vitarelli v. Seaton, 359 U.S. 535 9,10,15,16,17

Wicker v. Hoppock, 6 Wall. (73 U.S.) 94 17

Statutes and regulations:

Back Pay Act:
5 U.S.C. 5596 6,8,10,15,16,18,20

Civil Service Reform Act of 1978,
Pub.L.No. 95-454, 92 Stat. 1111
et seq. 6,7,8,9,11,12,14,15,16,17,18,19

Ch. 77, 5 U.S.C. 7701 et seq.:
5 U.S.C. 7703(c) 4

5 U.S.C. 5724 2

Tucker Act:
28 U.S.C. 1491 6,7,8,9,10,15,16,20

28 U.S.C. 2342 4

5 C.F.R. 771.205 9

370 DM 772,3.22A 9

Miscellaneous:

Civil Service Reform Act of 1978 and
Reorganization Plan No. 2 of 1978:
Hearings on S. 2640, S. 2707, and
S. 2830 Before the Senate Comm. on
Governmental Affairs, 95th Cong.,
2d Sess. (1978) 19

18 Cong. Rec. 2680 (1887) 10

55 U.S. Law Week 2228 (1986) 16

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. 86-595

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH A. FAUSTO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 783 F.2d 1020. The order of the court of appeals denying a petition for rehearing (Pet. App. 10a-23a) is reported at 791 F.2d 1554. The opinion of the United States Claims Court (Pet. App. 24a-29a) is reported at 7 Cl.Ct. 459.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1986. The court of appeals entered an order denying rehearing on May 14, 1986. On August 11, 1986, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 11, 1986. The respondent received the government's petition for a writ of certiorari on October 17, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are set forth in App. 1a-3a.

STATEMENT

On January 8, 1978, the U.S. Department of the Interior (agency) transferred the respondent from his competitive service (career tenured) position with another federal agency for "permanent duty" (5 U.S.C. 5724) as an administrative officer for its Young Adult Conservation Corps (YACC) camp in Virginia Beach, Virginia. The respondent was at that time promoted to a term position in the excepted service, an appointment which was for the

duration of the YACC program, not to exceed a certain date in 1982 (Pet. App. 1a-2a).

On January 16, 1981, the agency removed the respondent from his position for cause. The agency informed the respondent of its decision by a memorandum dated January 2, 1981, however, the agency did not inform the respondent of his grievance rights as a "career-type" employee in an excepted service position, which included the right to a formal hearing by a grievance examiner (App. 3a). Without being aware of his rights with regard to his agency, the respondent filed timely appeals with the U.S. Merit Systems Protection Board (MSPB) in February and May, 1981, to which the agency answered that the respondent was given every right to which he was entitled. In August, 1981, the MSPB denied the respondent's petition for review for lack of jurisdiction over his appeal (Pet. App. 3a).

On September 18, 1981, the agency closed the YACC camp at which respondent was employed when he was removed. Without being aware of the agency's action with regard to the position from which he had been removed, respondent filed a timely appeal with the United States Court of Appeals for

the Fourth Circuit, invoking jurisdiction under 28 U.S.C. 2342, and prayed, pursuant to 5 U.S.C. 7703(c), that his removal be "set aside" on the grounds that it was "obtained without procedures required by [the agency's] regulations having been followed." Respondent simultaneously sought an injunction pending judicial review on the grounds that, were the court to wait until after its review to set aside his removal, there might be no position to which to restore the respondent. The court denied respondent's petition for an injunction. While the appeal was pending, the agency, in response to a Congressional inquiry initiated by the respondent, admitted that the respondent had not been apprised of his grievance rights when he was removed, stated that the respondent would be offered the opportunity to challenge his removal, and submitted that, should the respondent prevail, his removal would be cancelled. By letter dated March 22, 1982, the agency offered respondent his grievance rights, but neither invoked jurisdiction under its grievance regulations by restoring respondent to the rolls so that his grievance could be legally adjudicated (App. 3a) nor alluded to its having abolished the respondent's former position (Pet. App. 12a). In April, 1982, the court of appeals dismissed the respondent's appeal as premature and remitted him

to the agency to exhaust a second administrative remedy (Pet. App. 3a).

The respondent filed a formal grievance in May, 1982. On June 30, 1982, the agency concluded, based on the administrative file without a hearing, that the respondent should not have been removed for cause, but instead should have been suspended for one month. As a means of settling the respondent's grievance, the agency offered a partial back pay award covering the period from when the respondent's constructive suspension would have ended to the date the agency asserted--for the very first time to the respondent--that it abolished his former position (Pet. App. 25a).

Claiming that this was inadequate relief, the respondent pursued his administrative claim to the Secretary of the Interior, who upheld the offer of partial back pay on the grounds that the respondent's removal had been cancelled and that the respondent's retroactive termination effective September 18, 1981 would invoke neither reduction in force nor adverse action procedures requiring a hearing. On February 1, 1983, the agency cancelled the respondent's removal under the legal authority of the Back Pay Act and,

at the same time, involuntarily separated the respondent from the position to which he had just been restored, under color of reduction in force regulations. In March, 1983, respondent received the partial back pay award offered by the agency in June, 1982 (Pet. App. 25a-26a).

In February, 1983, respondent filed a Back Pay Act action in the Claims Court, seeking restoration to a position comparable to the one from which he was wrongfully removed, and back pay "for the period for which" his wrongful removal was in effect (App. 2a). The jurisdiction of the Claims Court was invoked under the Tucker Act, 28 U.S.C. 1491 (App. 1a). The government answered by contending that the Civil Service Reform Act of 1978 (CSRA) enumerated an all-inclusive catalogue of remedies for adverse personnel actions and therefore impliedly precluded judicial review of federal employee claims either in the Claims Court or any other judicial forum. On cross-motions for summary judgment, the Claims Court held for the government (Pet. App. 2a).

The United States Court of Appeals for the Federal Circuit reversed, holding that an agency regulation was violated in order to accomplish the respondent's removal,

that the agency was bound by its own regulation, and therefore the respondent's claims fall within the terms of the Tucker Act. The court of appeals rejected the government's argument that the CSRA had extinguished the respondent's right of action under the Tucker Act for the vindication of rights granted by an executive department regulation. On the merits, the court of appeals held that the respondent was entitled to back pay for the period of his constructive suspension, citing case authority of one of its predecessor courts for the proposition that an unlawful administrative action depriving an individual of a procedural right voids the action and leaves the employee on the rolls and entitled to his pay otherwise due until proper procedural steps are taken toward separating him (Pet. App. 7a-8a). Although the court noted that the agency delayed beyond a short and reasonable period to apprise the respondent of his grievance rights after abolishing his former position, and that the agency failed to conduct a hearing on the respondent's removal in accordance with its own regulations (Pet. App. 2a), it declined to hold that the respondent was entitled to back pay after his former position was abolished by the agency, and remanded for a determination of the amount of back pay due respondent. Subsequently, the court of appeals

denied the government's petition for rehearing, holding that the respondent clearly had the right to file his grievance before he was removed, that the CSRA had not silently repealed the Tucker Act remedy available to respondent, that the respondent is protected by the Back Pay Act, and that an employing agency must comply with a regulation which it considered important enough to promulgate in the first place. The court concluded that, in the Tucker Act and the Back Pay Act, Congress provided a remedy for a federal employee whose agency admittedly did not comply with its own regulation in removing him, and that the CSRA did not eliminate the previously existing remedy (Pet. App. 10a-23a).

REASONS FOR DENYING THE PETITION

1. The government challenges the decision of the court of appeals on essentially two grounds. First, the government maintains (Pet. 9) that the decision below is inconsistent with several decisions of the regional circuits holding that federal adverse personnel actions are reviewable under the CSRA or not at all. Second, the government contends (Pet. 16) that the decision below would allow non-veterans in the excepted service to proceed directly to federal court

with claims that they were removed in violation of applicable regulations, thus giving such individuals an access to the courts more immediate and direct than the CSRA provides to career employees. Neither argument merits review by this Court.

a. The government's complaint about the lack of statutory authority in the CSRA to allow the respondent to obtain judicial review of his removal ignores 28 U.S.C. 1491(a)(1), which states, in pertinent part, that "[t]he United States Claims Court shall have jurisdiction upon any claim against the United States founded...upon...any regulation of an executive department..." (App. 1a). In the exercise of his responsibility pursuant to 5 C.F.R. 771.205 to establish a grievance system under which his employees may raise "any matter of concern or dissatisfaction relating to the employment of an employee which is subject to the control of agency management" (Pet. 10), the Secretary of the Interior promulgated an agency regulation, 370 DM 772,3.22A (App. 3a), which granted the respondent certain rights, and the agency was bound by its own regulation. Vitarelli v. Seaton, 359 U.S. 535, 539-40, 79 S.Ct. 968, 972-73, 3 L.Ed.2d

1012 (1959)(Pet. App. 3a).

As this Court stated in United States v. Mitchell, 463 U.S. 206, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983), according to its legislative history, the Tucker Act, 28 U.S.C. 1491, was originally designed "to give the people of the United States what every civilized nation of the world has already done--the right to go into the courts to seek redress against the Government for their grievances." 18 Cong. Rec. 2680 (1887). Furthermore, this Court found that the Back Pay Act, 5 U.S.C. 5596, does provide a basis for money damages as a remedy in circumstances such as wrongful personnel actions effected by the government. United States v. Mitchell, 463 U.S. at 217. Accordingly, there can be no serious question that the court of appeals correctly rejected the government's argument that, notwithstanding the existence of a valid agency regulation granting certain rights to the respondent and the agency's admitted violation of that regulation, and notwithstanding the existence of Supreme Court case law binding the agency to abide its own regulation, Vitarelli v. Seaton, 359 U.S. 535 (1959), Service v. Dulles, 354 U.S. 363 (1957), for individuals in respondent's circumstance there is not any review in any

forum, administrative or judicial (Pet. App. 19a).

Nevertheless, the government maintains, the court of appeals' decision in this case is in conflict with decisions of the regional circuits, citing Veit v. Heckler, 746 F.2d 508, 511 (9th Cir. 1984) for the proposition that "the comprehensive nature of the procedures and remedies provided by the CSRA indicates a clear congressional intent to permit federal court review as provided in the CSRA or not at all" (Pet. 11). The court of appeals found all of the government's cited cases to be distinguishable in that the employee was subject to the adverse action provisions of the CSRA and was seeking some sort of additional remedy, and noted with respect to Veit v. Heckler, 746 F.2d 508 (9th Cir. 1984), that the case did not involve an adverse personnel action, but an employee's performance rating (Pet. App. 22a). In any event, it appears that the Ninth Circuit has since adopted the same reasoning as that applied by the court of appeals here (Pet. App. 17a, 19a), for, in Kotarski v. Cooper, 799 F.2d 1342 (9th Cir. 1986), the court held that an employee who was not covered by the procedures and remedies provided by the CSRA was not barred from seeking judicial review of

his claim for reinstatement and back pay in the Claims Court.

b. The government contends that the decision below would allow "non-veterans in the excepted service" to proceed directly to federal court with claims that they were removed in violation of applicable regulations, while "competitive service employees and veterans" are required to exhaust their administrative remedies under the CSRA. Thus, the government reasons, "non-veterans in the excepted service--to whom Congress plainly granted lesser rights under the CSRA than to competitive service employees and veterans--are given 'an access to the courts more immediate and direct than the statute provides with regard to' those other employees," quoting Carducci v. Regan, 714 F.2d 171 (D.C. Cir. 1983), concluding, "Congress did not intend such an anomalous result" (Pet. 16). There are two problems with this argument.

First, it overlooks the plain language of the valid departmental regulation admittedly violated by the government in this case (App. 3a), which provides for a hearing on an administrative grievance filed by a "career-type" excepted service employee removed for cause, such as respondent. It

is axiomatic that the respondent was required to exhaust his administrative remedy by filing a grievance with the agency before proceeding to the Claims Court, just as a competitive service employee is required to exhaust his administrative remedy by filing an appeal with the MSPB before proceeding to the court of appeals. Indeed, the respondent had a less direct access to the court of appeals than employees in the competitive service in that he was required to exhaust his administrative remedy with the agency and then appeal to the Claims Court before being allowed to proceed before the court of appeals, whereas competitive service employees need only appeal to the MSPB before proceeding before the court of appeals. Thus, it is clear from the facts in this case that no "anomalous result" was reached by the court of appeals.

Second, the government's argument overlooks the fact that this line of reasoning was recently rejected by the same court which decided Veit v. Heckler, 746 F.2d 508 (9th Cir. 1984). In Kotarski v. Cooper, 799 F.2d 1342 (9th Cir. 1986), the government contended that it would be anomalous to give probationary employees a right to maintain action in federal court under Bivens v. Six Unknown Named

Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), while fully tenured employees are confined to their civil service remedies under the CSRA. Although the court conceeded that this might be true, it observed that the alternative, which appeared equally anomalous, would be to hold that a Bivens action that would otherwise be appropriate for a probationary employee is rendered inappropriate by the enactment of a scheme of enforceable remedies (the CSRA) from which probationary employees are excluded by definition. To reach such a result, the court stated that it would have to conclude that Congress had both the intention and the authority to deprive probationary employees of all meaningful protection for their constitutional rights. The court therefore held that Congress "could not have intended such an untoward result." Kotarski v. Cooper, 799 F.2d at 1349.

In any event, the burden on the government to abide its own regulation in this case was small. Under the decision of the court of appeals (Pet. App. 8a), the agency could have issued its reconsidered decision reversing the respondent's removal within a short and reasonable period of time, but instead waited one and one-half years after its

original decision--and even delayed until after abolishing the respondent's former position--to remedy its procedural error. The court noted that no unusual circumstances existed to justify the government's delay, and that the agency's belated recognition of the respondent's regulatory rights resulted from the respondent's own pro se (Pet. App. 11a) efforts. Therefore, it is well settled, as the court of appeals concluded, "that an employing agency must comply with a regulation which it considered important enough to promulgate in the first place" (Pet. App. 22a), and that, "[i]n the Tucker Act and the Back Pay Act, Congress provided a remedy for a federal employee whose agency admittedly did not comply with its own regulation in removing him.....The court is not free to dismantle what Congress has so carefully constructed" (Pet. App. 23a).

2. Relying upon its submission that the CSRA "clearly and convincingly precludes judicial review," the government asserts that, notwithstanding that agencies are bound by their regulations, citing Vitarelli v. Seaton, 359 U.S. 535 (1959), and notwithstanding that repeals of Acts of Congress by implication are disfavored by the courts,

citing Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974), "it does not follow that judicial review is warranted to ensure that agencies comply with their regulations" (Pet. 15). The government does not suggest that prospects of future similar violations of regulations are so remote as to make injunctive relief inappropriate. Rather the government maintains, inferentially, that it reserves to itself an inherent power "to do what it wants" (55 U.S. Law Week 2228 (1986)), regardless of regulations.

This argument fails because its premise is faulty. The court of appeals below accurately observed that the government cited no legislative history of the CSRA expressing a Congressional intent to repeal the Tucker Act and the Back Pay Act, or an intent to bar judicial review of discharges brought by individuals such as respondent (Pet. App. 21a).

This Court has, at least on two occasions, ordered injunctive relief in favor of federal employees discharged in violation of valid departmental regulations. Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363

(1957). Here, the government admitted that it had violated applicable regulations in removing the respondent (Pet. App. 19a, 23a). Under traditional equitable principles, individuals in circumstances similar to the respondent's would be entitled to injunctive relief to guard against the government's future regulatory violations on the same cause of action. This Court recognized this over one century ago in Wicker v. Hoppock, 6 Wall. (73 U.S.) 94, 18 L.Ed.752 (1867), when it declared:

> The general rule is that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.

While the government does not articulate exactly what "is warranted to ensure that agencies comply with their regulations," it necessarily concedes "that agencies are bound by their regulations," correctly citing Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959)(Pet. 15).

3. Finally, the government contends (Pet. 11-16) that the CSRA "clearly and convincingly precludes judicial review" of discharges for non-veterans in the excepted service

such as respondent. The government argues that "[i]t could hardly be clearer that personnel such as respondent were not forgotten by the draftsmen of the CSRA; rather they were deliberately granted lesser rights than other federal employees" (Pet. 14).

The first answer to this contention, of course, is that the agency has already paid compensatory damages to the respondent under the authority of the Back Pay Act, 5 U.S.C. 5596 (App. 1a-2a). If additional compensatory damages are awarded to the respondent by the Claims Court on remand, the government may then seek review of the propriety of that relief in the court of appeals (Pet. 13).

On the other hand, it is submitted that Congressional intent in the CSRA with regard to individuals such as respondent was clear, but not as the government characterizes it in its petition. Quoting what it regards as pertinent and relevant portions of testimony given by the Chairman of the former Civil Service Commission (Pet. 14), the government summarily concludes that "under the CSRA non-veterans in the excepted service would have the right to appeal only if OPM

so provided." However, an extended quotation of the same testimony reveals that the draftsmen of the CSRA intended that career employees in the excepted service such as respondent (App. 3a) should not be barred from obtaining review of their discharges:

> [T]he Office of Personnel Management is authorized to extend adverse action and appeals coverage to positions administratively excepted from the competitive service. Presently, employees in the excepted service (other than those entitled to veteran preference) are entitled to only those rights which may be provided by agency regulations, without the right of appeal to the Civil Service Commission. [Pet. 14]
>
> Yet many of these administratively excepted employees are careerists within their agencies. The rights extended to competitive service employees by Executive Order are now established as basic employee rights. Consideration of equity and fairness--which is at the very heart of the merit concept--dictates that all employees with Federal career expectations should be accorded equal rights, rather than making their rights dependent upon their entitlement to veterans preference or upon an administrative determination that a competitive examination can or cannot be administered.

Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings on S. 2640, S. 2707, and S. 2830 Before the Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess. 99-100 (1978)(statement of Alan K. Campbell). Thus, even

assuming arguendo that Congress intended to deprive career employees in the excepted service such as respondent of equal rights, as the government here contends, it remains clear that respondent was "entitled to...those rights which [are] provided by agency regulations," and it necessarily follows, as the court of appeals correctly held, that the respondent was not barred from obtaining judicial review of his removal under the Tucker Act, 28 U.S.C. 1491, which authorizes review of any claim against the United States founded upon any regulation of an executive department (App. 1a).

The court of appeals in the present case concluded that the respondent may obtain judicial review of his removal in the Claims Court under the Tucker Act, 28 U.S.C. 1491 (Pet. App. 3a-6a). This conclusion was a reasonable one, for, as the court noted, preclusion of such suits as here challenged by the government would pose a direct threat to the realization of the statutory objectives of the Tucker Act and the Back Pay Act, which objectives, with respect to individuals such as the respondent, would no longer be realized through the specific remedy provided by Congress (Pet. App. 16a).

CONCLUSION

The government's petition for a writ of certiorari should be denied.

Respectfully submitted,

Joseph A. Fausto

Joseph Anthony Fausto

1111 Arlington Boulevard
W-310
Arlington, Virginia 22209

(703) 528-2746

Appearing pro se

November 17, 1986

APPENDIX A

STATUTES INVOLVED

CHAPTER 91 - COURT OF CLAIMS

Sec. 1491. Claims against United States generally * * *

(a)(1) The United States Claims Court shall have jurisdiction upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. * * *

* * * * *

SUBCHAPTER IX - SEVERANCE PAY AND BACK PAY

* * * * *

Sec. 5596. Back pay due to unjustified personnel action

(a) For the purpose of this section, "agency" means--
(1) an Executive agency * * *

* * * * *

(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee--

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect--

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the personnel action which * * * shall be awarded in accordance with standards established under section 7701(g) of this title; and

(B) for all purposes, is deemed to have performed service for the agency during that period, * * *

APPENDIX B

REGULATION INVOLVED

CHAPTER 771 - EMPLOYEE GRIEVANCES

Subch. 3. Employee Grievances

* * * * *

3.3 Definitions.

* * * * *

B. Employee may include a current or former employee of the Department for whom a specific remedy can still be appropriately provided. Former employees must file a timely grievance concerning a matter appropriate for review under these procedures prior to separation in order to receive consideration.

* * * * *

3.22 Separation Hearings.

A. When separated for cause, including performance deficiencies, a nonpreference "career-type" employee in the excepted service who has completed one year of current continuous service in the same or similar positions and whose position has been specifically included by the Bureau head or higher authority as covered under the procedures of 370 DM 752, is accorded a right to a formal hearing conducted by a grievance examiner. This right does not apply to an employee whose appointment is made by and with the advice and consent of the Senate or whose position is of a confidential, policy making or policy advocating character. * * *

REPLY BRIEF

Supreme Court, U.S.
FILED
DEC 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-595

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH A. FAUSTO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Bush v. *Lucas*, 462 U.S. 367 (1983) 3

Carducci v. *Regan*, 714 F.2d 171 (D.C. Cir. 1983) 1, 5

Hubbard v. *EPA*, No. 85-5145 (D.C. Cir. Dec. 5, 1986) 3, 4

Kotarski v. *Cooper*, 799 F.2d 1342 (9th Cir. 1986) 2, 3

Pinar v. *Dole*, 747 F.2d 899 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985) 1

Spagnola v. *Mathis*, No. 84-5530 (D.C. Cir. Dec. 5, 1986) 3, 4, 5

Veit v. *Heckler*, 746 F.2d 508 (9th Cir. 1984) 1, 3

Statutes:

Civil Service Reform Act of 1978:

5 U.S.C. 2302 2

5 U.S.C. 3318(b)(1) 4

5 U.S.C. 3321(a)(2) 3

5 U.S.C. 4303(f) 3

5 U.S.C. 7511(a)(1) 3

5 U.S.C. 7511(c) 2

Tucker Act, 28 U.S.C. 1491 1

42 U.S.C. 1985(1) 5

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-595

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH A. FAUSTO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

In our petition (at 9-10) we demonstrated that the court of appeals' decision that respondent may obtain judicial review under the Tucker Act, 28 U.S.C. 1491, presents a recurring question of considerable practical importance, as the court below twice noted (Pet. App. 3a, 12a). We also established (Pet. 11-12) that the decision below conflicts with the decisions of other courts of appeals, which have held that the comprehensive scheme set forth in the Civil Service Reform Act (CSRA) demonstrates that Congress intended to preclude review of adverse personnel actions under more general statutes. See, *e.g.*, *Pinar* v. *Dole*, 747 F.2d 899, 912-913 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); *Veit* v. *Heckler*, 746 F.2d 508, 510-511 (9th Cir. 1984); *Carducci* v. *Regan*, 714 F.2d 171, 173-175 (D.C. Cir. 1983).

Respondent does not dispute our contention that the question presented is an important question that is likely to affect a large number of cases. However, respondent disputes our claim that there is a conflict in the circuits. He notes (Br. in Opp. 11) that the court of appeals distinguished the decisions of other circuits on the basis that the employees in those cases were subject to the adverse action provisions of the CSRA and were seeking an additional remedy. Respondent argues that the court below correctly distinguished those cases because he is not covered by the CSRA. Contrary to that argument, we demonstrated in our petition (at 12-13) that the court below clearly erred in distinguishing this case from the decisions of other circuits on the basis that non-veterans in the excepted service are not covered by the CSRA. Employees such as respondent are covered by the CSRA, although they are precluded from obtaining judicial review of adverse personnel actions and are generally limited to seeking relief from the Office of the Special Counsel (OSC), and may obtain relief from the OSC only if they have been subjected to a "prohibited personnel practice" (see 5 U.S.C. 2302). Furthermore, as we also demonstrated in our petition (at 13-14), the fact that Congress has granted employees such as respondent very limited rights under the CSRA does not support the court of appeals' conclusion that Congress did not intend to preclude review under the Tucker Act. Rather, it demonstrates that Congress did not desire that such employees be able to obtain judicial review of adverse personnel actions unless the Office of Personnel Management (OPM) extended appeal rights to them as provided by 5 U.S.C. 7511(c) (Pet. App. 36a).

Respondent suggests (Br. in Opp. 11, 13-14) that the Ninth Circuit's recent decision in *Kotarski* v. *Cooper*, 799 F.2d 1342 (1986), diminishes the conflict between the court below and that circuit. In fact, the decision in that case, as

well as two recent decisions of the District of Columbia Circuit, *Spagnola* v. *Mathis*, No. 84-5530 (Dec. 5, 1986), and *Hubbard* v. *EPA*, No. 85-5145 (Dec. 5, 1986), demonstrate that there is continuing disagreement in the courts of appeals regarding the preclusive effect of the CSRA. Review by this Court is warranted to resolve that disagreement.

In *Kotarski* the court considered a *Bivens* claim brought by a federal employee who was demoted from a supervisory position during the probationary period he was required to serve as a new supervisor (see 5 U.S.C. 3321(a)(2)).[1] Probationary employees are treated much like non-veteran excepted service employees under the CSRA, in that neither may obtain judicial review of adverse personnel actions under the CSRA (see 5 U.S.C. 4303(f) (Pet. App. 34a) and 7511(a)(1) (Pet. App. 36a)), although both types of employees may complain to the OSC. Despite this Court's decision in *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983), that a federal employee could not bring a *Bivens* action in light of the "elaborate remedial system that has been constructed step by step, with careful attention to competing policy considerations," a divided panel of the Ninth Circuit held in *Kotarski* that the plaintiff was not barred from bringing suit

---

[1]In addition to bringing a *Bivens* claim, the plaintiff in *Kotarski* sought review under the Administrative Procedure Act (APA) and the Tucker Act. The court held that review under the APA was precluded by *Veit* (799 F.2d at 1350), where the court held that "the comprehensive nature of the procedures and remedies provided by the CSRA indicates a clear congressional intent to permit federal court review as provided in the CSRA or not at all" (746 F.2d at 511). The court also held that the district court lacked jurisdiction over the plaintiff's Tucker Act claim, remanding for consideration as to whether that claim should be transferred to the Claims Court (799 F.2d at 1344-1345). Contrary to respondent's suggestion (Br. in Opp. 11-12), nothing in the court's opinion can be read as holding that the plaintiff's Tucker Act claim is not barred by the CSRA.

by the CSRA. Much like the court below, the Ninth Circuit concluded that the plaintiff could proceed with his *Bivens* action because his remedies under the CSRA were limited in comparison with the remedies available to other federal employees, such as the plaintiff in *Bush* v. *Lucas*.

The District of Columbia Circuit has already expressed its disagreement with the Ninth Circuit's decision in *Kotarski*. *Hubbard* involved a claim brought by an unsuccessful job applicant whose only remedies under the CSRA were to seek relief from the OPM under 5 U.S.C. 3318(b)(1) or to file a claim with the OSC (slip op. 13). The court held that the plaintiff was precluded from bringing a *Bivens* action. The court described the decision in *Kotarski* as "unpersuasive," stating that "we believe that decision misinterprets *Bush* and fails to consider fully the disruptive influence of *Bivens* actions on the civil service" (slip op. 20 n.14).

On the same day that it issued its opinion in *Hubbard*, the District of Columbia Circuit held in *Spagnola* that a federal employee who claimed that he had been denied a promotion improperly could bring a *Bivens* action. As did the Ninth Circuit in *Kotarski*, the court distinguished *Bush* v. *Lucas* on the basis that the plaintiff's only remedy under the CSRA, an appeal to the OSC (*Spagnola*, slip op. 10), was inadequate. The court acknowledged that its decision conflicted with the Fourth Circuit's decision in *Pinar* (*id.* at 21-22), and also noted that its decision was consistent with the Ninth Circuit's decision in *Kotarski* (*Spagnola*, slip op. 9-10 n.5). The two panels of the District of Columbia Circuit recognized that their decisions conflict with each other and recommended rehearing en banc on the *Bivens* issue. *Hubbard*, slip op. 2 n.3; *Spagnola*, slip op. 3 n.1.[2]

---

[2]Since, as the *Spagnola* panel noted, its decision conflicts with *Pinar* but is consistent with *Kotarski*, there will be a conflict in the circuits on the *Bivens* issue no matter how the District of Columbia Circuit resolves the conflict between *Hubbard* and *Spagnola*.

Although the court in *Spagnola* held that the CSRA did not preclude the plaintiff from pursuing a *Bivens* action, the court stated that "Congress meant the CSRA to be the exclusive *statutory* remedy for aggrieved federal employees" (slip op. 25 (emphasis added)). It accordingly held that the CSRA foreclosed the plaintiff from bringing a claim under 42 U.S.C. 1985(1). The court concluded that the plaintiff in *Spagnola* would have had a claim under Section 1985(1) but for the preclusive effect of the CSRA (slip op. 25-28), just as the court below held that, prior to the enactment of the CSRA, excepted service employees could obtain review under the Tucker Act. The court in *Spagnola* nevertheless held that the plaintiff's Section 1985(1) claim was barred by the CSRA, relying on *Carducci*, where the court held that "the CSRA implicitly *eliminated* a right of action that previously existed" (714 F.2d at 173 (emphasis in original)). Furthermore, the court held that the plaintiff in *Spagnola* was barred from bringing a Section 1985(1) claim even though his only remedy under the CSRA was to seek relief from the OSC, which had decided to take no action (slip op. 6). Thus, even the panel that held, despite this Court's decision in *Bush* v. *Lucas*, that a government employee with limited remedies under the CSRA may pursue a *Bivens* action disagreed with the position taken by the court of appeals in this case.

Accordingly, it is clear that the courts of appeals are divided on the question presented. In addition to the cases cited in our petition, the District of Columbia Circuit's decision in *Spagnola* is flatly contrary to the decision below. The courts are also divided on the related question whether the CSRA precludes federal employees from bringing *Bivens* actions challenging personnel decisions, as the recent decisions of the Ninth and District of Columbia Circuits illustrate.

For the foregoing reasons and the additional reasons stated in the petition for a writ of certiorari, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

DECEMBER 1986

PETITIONER'S

BRIEF

(3)

No. 86-595

Supreme Court, U.S.
FILED
APR 22 1987
JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH A. FAUSTO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LOUIS R. COHEN
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

DAVID M. COHEN
ROBERT A. REUTERSHAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

45pp

QUESTION PRESENTED

The Civil Service Reform Act of 1978 provides a comprehensive set of remedies, including in specified circumstances review by the Merit Systems Protection Board and judicial review of the action of the Board, for federal civil service personnel who suffer adverse personnel actions. The question presented is whether non-veteran personnel in the "excepted service," for whom the Act provides no right of review, may obtain judicial review of adverse personnel actions under the Tucker Act, 28 U.S.C. 1491.

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	8
Argument:	
The Civil Service Reform Act sets out the exclusive remedies for federal employees who have suffered adverse personnel actions	11
A. A comprehensive and specific remedial statute preempts more general remedies	11
B. The CSRA is a comprehensive statute that governs the procedures to be followed in adverse personnel actions involving federal employees	13
C. As other courts of appeals have recognized, the CSRA preempts recovery under more general statutes	24
D. The fact that respondent cannot obtain judicial review under the CSRA precludes, rather than supports, permitting him to bring suit under the Tucker Act	27
Conclusion	36

TABLE OF AUTHORITIES

Cases:

Barnhart v. *Devine*, 771 F.2d 1515 (D.C. Cir. 1985)	27
Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)	25
Block v. *Community Nutrition Institute*, 467 U.S. 340 (1984)	23

Cases—Continued: Page

Borrell v. *United States International Communications Agency*, 682 F.2d 981 (1982) 24
Broadway v. *Block*, 694 F.2d 979 (5th Cir. 1982) 26
Brown v. *General Services Administration*, 425 U.S. 820 (1976) 8, 11
Bulova Watch Co. v. *United States*, 365 U.S. 753 (1961) 11
Burroughs v. *OPM*, 764 F.2d 1300 (9th Cir. 1985) 26
Bush v. *Lucas*, 462 U.S. 367 (1983) 24
Carducci v. *Regan*, 714 F.2d 171 (D.C. Cir. 1983) 9, 10, 12, 16, 21, 26, 32, 34, 36
Chu v. *United States*, 773 F.2d 1226 (Fed. Cir. 1985) 30
Cleveland Board of Education v. *Loudermill*, 470 U.S. 532 (1985) 30
Cook County National Bank v. *United States*, 107 U.S. 445 (1882) 11, 28
Cornelius v. *Nutt*, 472 U.S. 648 (1985) 6, 16
Crisan v. *United States*, 223 Ct. Cl. 682 (1980) 30
Cutts v. *Fowler*, 692 F.2d 138 (D.C. Civ. 1982) 24
Dugan v. *Ramsay*, 727 F.2d 192 (1st Cir. 1984) 27
Fausto v. *Department of Interior*, 738 F.2d 454 (Fed. Cir. 1984) 4, 24
Fowler v. *United States*, 633 F.2d 1258 (8th Cir. 1980) 30
Greenway v. *United States*, 163 Ct. Cl. 72 (1963) 5, 35
Hadley Memorial Hospital, Inc. v. *Schweiker*, 689 F.2d 905 (10th Cir. 1982) 33
Harrison v. *Bowen*, No. 86-5168 (D.C. Cir. Apr. 3, 1987) 9, 10, 24, 26, 30, 31, 32, 33, 34
Hubbard v. *EPA*, 809 F.2d 1 (D.C. Cir. 1986) 25
Jones v. *Alexander*, 613 F.2d 314 (5th Cir.), cert. denied, 449 U.S. 832 (1980) 33
Kotarski v. *Cooper*, 799 F.2d 1342 (9th Cir. 1986) 25
Lindahl v. *OPM*, 470 U.S. 768 (1985) 13
Lovshin v. *Department of Navy*, 767 F.2d 826 (Fed. Cir. 1985), cert. denied, No. 85-882 (Apr. 7, 1986) 18
McClary v. *United States*, 775 F.2d 280 (Fed. Cir. 1985) 5, 9, 10, 12, 27, 28

Cases—Continued: Page

Pinar v. *Dole*, 747 F.2d 899 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985) 12, 25, 26
Polcover v. *Secretary of Treasury*, 477 F.2d 1223 (D.C. Cir.), cert. denied, 414 U.S. 1001 (1973) 14
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 28
Rosano v. *United States*, 800 F.2d 1126 (Fed. Cir. 1986) 12, 27, 35
Schwartz v. *Department of Transportation*, 714 F.2d 1581 (1983) 23
Service v. *Dulles*, 354 U.S. 363 (1957) 32
Smith v. *MSPB*, 813 F.2d 1216 (Fed. Cir. 1987) 9, 23
Spagnola v. *Mathis*, 809 F.2d 16 (D.C. Cir. 1986) 25, 26
United States v. *Connolly*, 716 F.2d 882 (Fed. Cir. 1983), cert. denied, 465 U.S. 1065 (1984) 7, 23-24, 35
United States v. *Erika, Inc.*, 456 U.S. 201 (1982) 23
Veit v. *Heckler*, 746 F.2d 508 (9th Cir. 1984) 12, 24-25
Vitarelli v. *Seaton*, 359 U.S. 535 (1959) 32
Wathen v. *United States*, 527 F.2d 1191 (Ct. Cl. 1975), cert. denied, 429 U.S. 821 (1976) 14
Weatherford v. *Dole*, 763 F.2d 392 (10th Cir. 1985) 26

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. (& Supp. III) 551 *et seq.* 12
- 5 U.S.C. 701(a)(1) 26
Age Discrimination in Employment Act of 1967, § 15(c), 29 U.S.C. 633a(c) 17
Back Pay Act, 5 U.S.C. 5596 4
Civil Rights Act of 1866, 42 U.S.C. 1981 11
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*:
§ 717, 42 U.S.C. 2000e-16 11
§ 717(c), 42 U.S.C. 2000e-16(c) 17
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 4

Statutes and regulations—Continued: Page

Ch. 11, 5 U.S.C. 1101 *et seq.*:
5 U.S.C. 1104-1105 15
Ch. 21, 5 U.S.C. 2101 *et seq.*:
5 U.S.C. 1204 21
5 U.S.C. 1205 15
5 U.S.C. 1206 ..... 16, 21
Ch. 21, 2101 *et seq.*:
5 U.S.C. 2102 2
5 U.S.C. 2103 (a) 2
5 U.S.C. 2108 (3) 14
Ch. 23, 5 U.S.C. 2301 *et seq.*:
5 U.S.C. 2302 ..... 16, 21
5 U.S.C. 2302 (a) (2) (B) 21
5 U.S.C. 2302 (b) 33
5 U.S.C. 2302 (b) (3) 21
5 U.S.C. 2302 (b) (7) 21
Ch. 31, 5 U.S.C. (& Supp. III) 3101 *et seq.*:
5 U.S.C. 3132 (a) (2) 2
Ch. 33, 5 U.S.C. (& Supp. III) 3301 *et seq.*:
5 U.S.C. 3301 2
5 U.S.C. 3302 (1) 2
Ch. 43, 5 U.S.C. (& Supp. III) 4301 *et seq.* 16
5 U.S.C. 4301 (2) 17
5 U.S.C. 4301 (2) (G) 17
5 U.S.C. 4303 (b) 17
5 U.S.C. 4303 (e) 6, 17
Ch. 75, 5 U.S.C. (& Supp. III) 7501 *et seq.* 18
5 U.S.C. (1976 ed.) 7501 13
5 U.S.C. 7501 (1) 18
5 U.S.C. 7511 *et seq.* 18
5 U.S.C. 7511 (a) (1) 19, 35
5 U.S.C. 7511 (b) (2) 20
5 U.S.C. 7511 (c) 19, 20
5 U.S.C. 7513 (a) 18
5 U.S.C. 7513 (d) 6, 19

Statutes and regulations—Continued: Page

Ch. 77, 5 U.S.C. 7701 *et seq.*:
5 U.S.C. (1976 ed.) 7701 13
5 U.S.C. 7701 (c) (2) (A) 6, 16
5 U.S.C. 7702 17
5 U.S.C. 7703 ..... 17, 19
5 U.S.C. 7703 (b) 15
5 U.S.C. 7703 (b) (2) 17
Declaratory Judgment Act, 28 U.S.C. 2201-2202 11
Fair Labor Standards Act of 1938, § 16 (b), 29 U.S.C. 216 (b) 17
Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 127 (a), 96 Stat. 37 15
Mandamus Act, 28 U.S.C. 1361 33
Rehabilitation Act of 1973, 29 U.S.C. 206 (d) 17
Tucker Act:
28 U.S.C. 1491 ..... 5, 12
28 U.S.C. 1491 (a) 5
28 U.S.C. 1331 ..... 11, 26
31 U.S.C. (1976 ed.) 638a (c) (2) 3
31 U.S.C. 1349 (b) 3
42 U.S.C. 1985 (1) 26
Exec. Order No. 10,577, 3 C.F.R. 218 (1954-1958 Comp.) 2
Exec. Order No. 11,491, *reprinted in* 5 U.S.C. (1976 ed.) 7301 note, at 580 14
5 C.F.R.:
Pt. 213:
Section 213.101 (a) 2
Section 213.3102 (a) 2
Section 213.3102 (d) 2, 23
Section 213.3102 (hh) (1978) 3
Section 213.3301 2
Pt. 315, Subpt. H 19
Pt. 752:
Section 752.401 (b) (3) 20
Section 752.401 (b) (4) 20

Statutes and regulations—Continued: Page

Pt. 1201:

Section 1201.56(c)(3) 6, 16

Miscellaneous:

Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings on S. 2640, S. 2707, and S. 2830 Before the Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess. (1978) 20

Department of Interior Federal Personnel Manual —231 (May 4, 1981) 3

H.R. 11280, 95th Cong., 2d Sess. (1978) 15

H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. (1978) 15

S. Rep. 95-969, 95th Cong., 2d Sess. (1978) 6, 13, 14, 15, 17, 19, 20, 30, 31

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-595

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH A. FAUSTO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-8a and Pet. App. 10a-23a (on rehearing)) are reported at 783 F.2d 1020 and 791 F.2d 1554, respectively. The opinion of the Claims Court (Pet. App. 24a-29a) is reported at 7 Cl. Ct. 459.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9a) was entered on February 10, 1986, and a timely suggestion of rehearing en banc was denied (Pet. App. 23a), with an accompanying order, on May 14,

1986. The petition for a writ of certiorari was filed on October 10, 1986, and was granted on January 12, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth at Pet. App. 30a-39a.

STATEMENT

1. Respondent was hired in January 1978 to work at a camp in Virginia operated by the Fish and Wildlife Service (FWS) of the Department of the Interior for a period to last no longer than the date the camp closed or September 30, 1982, whichever was earlier. Respondent's position was in the "excepted service," which "consists of those civil service positions which are not in the competitive service [see 5 U.S.C. 2102] or the Senior Executive Service [see 5 U.S.C. 3132 (a)(2)]." 5 U.S.C. 2103(a). Excepted service positions include positions for which it is not practical to hold competitive examinations, such as positions as chaplains and attorneys (5 C.F.R. 213.3102(a) and (d)), and "positions which are policy-determining or which involve a close and confidential working relationship with the head of an agency or other key appointed officials" (5 C.F.R. 213.3301).[1] Respondent's position was classified as an excepted service position

[1] Positions may be placed in the excepted service by statute, by the President, or by the Office of Personnel Management (OPM). 5 U.S.C. 3301, 3302(1); Exec. Order No. 10,577, 3 C.F.R. 218 (1954-1958 Comp.); see 5 C.F.R. 213.101(a). OPM informs us that as of November 1986 approximately 500,000 employees, about 23% of the federal workforce (excluding the Postal Service), were in the excepted service.

because it was impractical to hold examinations for the position since it was a temporary position. 5 C.F.R. 213.3102(hh) (1978).

In November 1980 respondent was advised that the FWS intended to dismiss him for a number of reasons, including the repeated unauthorized use of a government vehicle. After replying to the charges against him, respondent was removed from his position in January 1981. In September 1981 the camp at which respondent had been employed was closed. Pet. App. 24a-25a.

It subsequently came to the attention of the FWS that respondent had not been advised of his right, under regulations issued by the Department of the Interior, to file a grievance contesting his removal.[2] The FWS then provided him with the opportunity to do so and, in June 1982, the FWS concluded that removal had been too harsh a penalty for his misconduct. In lieu of removal, the FWS imposed upon respondent the statutorily required minimum penalty for misuse of a government vehicle, a 30-day suspension.[3] The FWS then awarded respondent back pay from February 15, 1981, the date his 30-day suspen-

[2] The regulation provided that "[w]hen separated for cause, including performance deficiencies, a nonpreference 'career-type' employee in the excepted service who has completed one year of current continuous service in the same or similar positions * * * is accorded a right to a formal hearing conducted by a grievance examiner." *Department of Interior Federal Personnel Manual—231*, Pt. 370 DM 771-3.22A (May 4, 1981).

[3] Section 638a(c)(2) of Title 31, United States Code (1976 ed.) (now codified at 31 U.S.C. 1349(b)), requires federal agencies to impose the penalty of a 30-day suspension, at a minimum, upon an employee found to have misused a Government vehicle, and provides that an employee may be removed for such misconduct.

sion would have ended, to September 18, 1981, the date the camp closed. Respondent challenged the grievance decision, claiming that he was entitled to back pay for the period covered by the 30-day suspension and from the date the camp closed to the date of a decision in his favor, but the decision of the FWS was sustained at each level of review provided by the Department of the Interior's regulations. Pet. App. 25a.

2. After it was determined that respondent, as an employee in the excepted service, had no right to appeal the Department of the Interior's decision to the Merit Systems Protection Board (MSPB) (see Pet. App. 27a; *Fausto* v. *Department of Interior*, 738 F.2d 454 (Fed. Cir. 1984) (Table)), he filed suit in the Claims Court, alleging jurisdiction under the Back Pay Act, 5 U.S.C. 5596. The government filed a motion for summary judgment contending that the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, which provides an elaborate scheme for administrative and judicial review of adverse actions taken against federal employees, precludes remedies under more general statutes for such adverse actions.

The Claims Court agreed that the CSRA "enumerates an all-inclusive catalogue of remedies for adverse personnel actions" taken against federal employees (Pet. App. 26a) and that an employee may challenge an adverse personnel action only in accordance with the "comprehensive scheme for review of federal employee personnel actions" established by the CSRA (*ibid.*). The Claims Court held that respondent "may not assert jurisdiction under the Back Pay Act for review of his claims in this court" (*id.* at 27a). It held in the alternative that, if respondent could maintain any claim in the Claims Court, he

was entitled to no more back pay than he had received from the FWS.[4]

3. The Federal Circuit reversed. It stated (Pet. App. 3a-4a), citing *Greenway* v. *United States*, 163 Ct. Cl. 72 (1963), that prior to the enactment of the CSRA an excepted service employee could seek redress under the Tucker Act, 28 U.S.C. 1491.[5] The court described the holding in *Greenway* as being that "a non-veteran, excepted appointment, probationary employee covered by [a] valid departmental regulation [was] entitled to trial on [the] merits for alleged arbitrary dismissal" (Pet. App. 3a-4a). The court recognized (*id.* at 3a) that it had held in *McClary* v. *United States*, 775 F.2d 280 (Fed. Cir. 1985), that the CSRA barred a competitive service employee from challenging an adverse action under the Tucker Act. The court distinguished *McClary* on the ground that the CSRA, which provides for judi-

[4] The court held that respondent was not entitled to any additional back pay because he had admitted his misuse of a government vehicle and the FWS was therefore required by law to suspend him for at least 30 days for that misconduct. And since, as an excepted service employee appointed for a limited period of time, respondent had no right to reassignment to another FWS activity after the FWS camp closed on September 18, 1981, he was entitled no back pay after that date. Therefore, the court concluded that respondent had been made whole. Pet. App. 27a-29a.

[5] Section 1491(a), which is entitled "Claims against United States generally; actions involving Tennessee Valley Authority," provides that the Claims Court has "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

cial review of major adverse actions, such as removals and demotions, taken against competitive service employees (5 U.S.C. 4303(e) (Pet. App. 33a-34a); 5 U.S.C. 7513(d) (Pet. App. 38a)), does not provide for judicial review of adverse actions taken against excepted service employees such as respondent. The court of appeals concluded that neither the CSRA nor its legislative history gives a clear indication of Congress's intention to repeal the right of excepted service employees to bring suit under the Tucker Act challenging adverse actions, and held that the Claims Court had jurisdiction over respondent's claim. Pet. App. 3a-6a. On the merits, while the court of appeals agreed with the Claims Court that respondent was not owed back pay for the period after the camp closed, it held that respondent was entitled to back pay for the period covered by the 30-day suspension (*id.* at 7a-8a). In the court of appeals' view, FWS's "belated recognition" of respondent's grievance rights barred it from imposing that suspension (*id.* at 8a).[6]

[6] Our petition for a writ of certiorari raised only the question whether respondent could obtain judicial review under the Tucker Act and did not challenge the court of appeals' conclusion that, under the facts of this case, the Department of the Interior did not correctly resolve the merits of respondent's claim. However, it seems plain that, as the Claims Court concluded, respondent received all the back pay to which he was entitled. The court of appeals' conclusion that FWS could not impose a 30-day suspension, even though by statute such a suspension was the minimum suspension that could be imposed on the undisputed facts of this case, is incorrect. 5 U.S.C. 7701(c)(2)(A) provides that an adverse action should be sustained unless the employee "shows harmful error in the application of the agency's procedures." See *Cornelius* v. *Nutt*, 472 U.S. 648 (1985); 5 C.F.R. 1201.56(c)(3); S. Rep. 95-969, 95th Cong., 2d Sess. 64 (1978) ("agency actions should be reversed because the agency's procedures were in error only if the procedures followed substantially

The court declined the government's suggestion of rehearing en banc. However, the panel treated the suggestion as a request for rehearing by the panel and issued a second opinion reaffirming its decision. The court rejected the contention that its decision was contrary to its decision in *United States* v. *Connolly*, 716 F.2d 882 (Fed. Cir. 1983) (en banc), cert. denied, 465 U.S. 1065 (1984), where the court concluded that probationary employees, who are treated much like excepted service employees under the CSRA in that they generally have no express right to judicial review of adverse actions taken against them, may not obtain judicial review of adverse actions. The court stated that the issue in *Connolly* was whether the probationary employee had an implied right of action under the CSRA, not whether he could obtain review under a general statute such as the Tucker Act (Pet. App. 20a-21a). The court also rejected the government's contention that its decision was contrary to numerous decisions of other courts of appeals dismissing attempts by federal employees to challenge adverse personnel actions under general statutes rather than the CSRA. The court stated that in the other cases "the employee was subject to the adverse action provisions of the CSRA and was seeking some sort of additional remedy" (Pet. App. 22a). This case was different, the court said, since respondent "was not subject to the adverse action provisions of the CSRA because he was in the excepted service" (*ibid.*).[7]

impaired the rights of the employees"); see also *id.* at 51. Respondent obviously suffered no harmful error as a result of the delay before he filed his grievance since the minimum penalty permitted was imposed.

[7] On January 12, 1987, the Court granted our petition for a writ of certiorari and denied respondent's cross-petition,

SUMMARY OF ARGUMENT

This Court has repeatedly held that "a precisely drawn, detailed statute pre-empts more general remedies." *Brown* v. *General Services Administration*, 425 U.S. 820, 834 (1976). The Civil Service Reform Act (CSRA) is a detailed statute that provides a comprehensive scheme of remedies for adverse actions against federal employees. Congress clearly intended the CSRA's judicial review provisions to replace the patchwork of decisions authorizing review under more general statutes.

The CSRA contains three relevant sets of provisions. In each, the rights of non-veterans in the excepted service—such as respondent—are dealt with advertently, and in each case judicial review is deliberately made largely unavailable to employees in that category. Chapter 43 of Title 5 provides in general that all non-probationary federal employees who are dismissed or demoted for unacceptable job performance have certain procedural rights, but it gives only competitive service employees and veterans in the excepted service the right to review of Chapter 43 actions before the Merit Systems Protection Board (MSPB) and the Federal Circuit. Chapter 75 provides that non-probationary employees in the competitive service and veterans in the excepted service who are subjected to major adverse actions to promote the efficiency of the service may obtain review in the MSPB and the Federal Circuit. However, non-veterans in the excepted service are excluded from coverage under Chapter 75 unless the Office of Personnel Management elects to include them, which in general it has not done. And Chapter 23 provides that non-veterans in the excepted service (and other federal employees) may bring claims that they were subjected to "prohibited personnel practices," which are 11 "heinous" practices enumerated in the statute, to the MSPB's Office of Special Counsel. The Special Counsel is charged with investigating prohibited personnel practices and, if she deems it appropriate, may bring such claims before the MSPB; but respondent has not alleged that he was subjected to any "prohibited personnel practice." As a non-veteran in the excepted service who did not allege that he was subjected to a prohibited personnel practice, respondent has no right to judicial review under any provision of the CSRA. It is also clear that respondent has no implied right of action under the CSRA. See, *e.g.*, *Smith* v. *MSPB*, 813 F.2d 1216 (Fed. Cir. 1987).

Every other court of appeals that has considered the question has concluded that the CSRA precludes federal employees from obtaining review under more general statutes. A number of courts have held that the specific provisions of the CSRA demonstrate congressional intent to preclude review under the Administrative Procedure Act (APA). See, *e.g.*, *Harrison* v. *Bowen*, No. 86-5168 (D.C. Cir. Apr. 3, 1987); *Carducci* v. *Regan*, 714 F.2d 171 (D.C. Cir. 1983). The same reasoning precludes review under the Tucker Act. Indeed, the Federal Circuit held in *McClary* v. *United States*, 775 F.2d 280 (1985), that competitive service employees have no right to review of adverse personnel actions under the Tucker Act because the CSRA remedies are, as to them, exclusive. That decision is plainly correct, and the court below did not disagree with it.

---

which contended that he was entitled to additional back pay for the period after the closing of the camp at which he worked.

The court below sought to distinguish *McClary* on the ground that whereas competitive service employees have a right to judicial review under the CSRA, which should not be enlarged by the Tucker Act, non-veterans in the excepted service are "not subject to the adverse action provisions of the CSRA" (Pet. App. 22a). But, first, the premise is wrong: non-veterans in the excepted service clearly are subject to the CSRA, and they have limited rights under it; these rights simply do not include MSPB or judicial review in the present circumstances. Second, as the court in *Harrison* stated, it makes no sense to conclude that because Congress has provided more limited rights to non-veterans in the excepted service than it has to competitive service employees and veterans, non-veterans in the excepted service have a right to proceed under the Tucker Act when those other employees may not. The court of appeals' decision leads, as the court in *Carducci* concluded in an analogous case, to the anomalous result that non-veterans in the excepted service are permitted to go directly to court, while competitive service employees and veterans must first present their claims to the MSPB. Contrary to the court below, the fact that Congress has made it clear that non-veterans in the excepted service may not obtain judicial review of adverse actions under the CSRA supports the conclusion that they should not be allowed to obtain judicial review, more quickly than other employees, under more general statutes.

ARGUMENT

THE CIVIL SERVICE REFORM ACT SETS OUT THE EXCLUSIVE REMEDIES FOR FEDERAL EMPLOYEES WHO HAVE SUFFERED ADVERSE PERSONNEL ACTIONS

A. A Comprehensive And Specific Remedial Statute Pre-empts More General Remedies

"[I]t is [a] familiar law that a specific statute controls over a general one." *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758 (1961). In 1882 this Court stated that "[a] law embracing an entire subject, dealing with it in all its phases, may thus withdraw the subject from the operation of a general law as effectually as though, as to such subject, the general law were in terms repealed." *Cook County National Bank* v. *United States*, 107 U.S. 445, 451. More recently, this Court noted that "[i]n a variety of contexts the Court has held that a precisely drawn, detailed statute pre-empts more general remedies." *Brown* v. *GSA*, 425 U.S. 820, 834 (1976). In *Brown* v. *GSA* the Court held that Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, "provides the exclusive judicial remedy for claims of discrimination in federal employment" (425 U.S. at 835), so that there was no remedy for such claims under the more general provisions of the federal-question jurisdiction statute, 28 U.S.C. 1331, the Declaratory Judgment Act, 28 U.S.C. 2201-2202, or the Civil Rights Act of 1866, 42 U.S.C. 1981 (425 U.S. at 823-824). In so holding, the Court reviewed a host of decisions in which the Court had "consistently held that a narrowly tailored employee compensation scheme pre-empts the more general tort recovery statutes" (*id.* at 834-835).

The Tucker Act, 28 U.S.C. 1491, under which the court of appeals held that a non-CSRA remedy could be provided in this case, is a general grant of jurisdiction. Entitled "Claims against United States generally," it provides jurisdiction for claims against the federal government based on the Constitution, federal statutes, regulations of executive departments, and contracts with the federal government (see note 5, *supra*). In a prior case under the Tucker Act, *McClary* v. *United States*, 775 F.2d 280 (1985), the Federal Circiut denied review of an adverse personnel action taken against a competitive service employee on the ground that the CSRA precludes non-CSRA remedies for adverse personnel actions. In a case decided subsequent to the decision here, the same court held that a probationary employee was precluded from seeking a remedy under the Tucker Act. *Rosano* v. *United States*, 800 F.2d 1126 (Fed. Cir. 1986) (per curiam). In a number of similar cases in which federal employees have sought review of adverse actions under the Administrative Procedure Act (APA), 5 U.S.C. (& Supp. III) 551 *et seq.*, the courts of appeals have without exception concluded that the CSRA remedies are exclusive and preclude APA review. See, *e.g.*, *Pinar* v. *Dole*, 747 F.2d 899 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); *Veit* v. *Heckler*, 746 F.2d 508 (9th Cir. 1984); *Carducci* v. *Regan*, 714 F.2d 171 (D.C. Cir. 1983). As we will show, these decisions are correct and the court below was wrong: the CSRA is a comprehensive and specific statute governing adverse personnel actions against federal employees. Its structure and provisions demonstrate congressional intent to deny any other remedy—to "withdraw the subject" of adverse personnel actions from review under more general statutes such as the Tucker Act and the APA.

B. The CSRA Is A Comprehensive Statute That Governs The Procedures To Be Followed In Adverse Personnel Actions Involving Federal Employees

The 1978 Senate Report on the CSRA described the civil service system as "an outdated patchwork of statutes and rules built up over almost a century." S. Rep. 95-969, 95th Cong., 2d Sess. 3. It stated that "[a]ssaults on the merit system have taken place despite, and in some instances because of, the complicated rules and procedures that have developed over the last century" (*ibid.*). The Report began by stating that "[t]he changes in law which are proposed in S. 2640 [the bill that became the CSRA] will constitute the most comprehensive reform of the Federal work force since passage of the Pendleton Act in 1883" (*id.* at 1). It reiterated that, despite enormous growth in the federal workforce, "no systematic congressional review or revision of the system has been attempted in close to 100 years. S. 2640, as amended, is that long overdue, comprehensive reform." *Ibid.* This Court has recognized that, in enacting the CSRA, Congress "comprehensively overhauled the civil service system." *Lindahl* v. *OPM*, 470 U.S. 768, 773 (1985).

1. Prior to the enactment of the CSRA, the United States Code provided that competitive service employees were entitled to notice before they were removed or suspended without pay. 5 U.S.C. (1976 ed.) 7501. It also provided that veterans were entitled to appeal adverse actions to the Civil Service Commission. 5 U.S.C. (1976 ed.) 7701.[8] Competitive

[8] The statute actually spoke in terms of "preference eligibles" rather than "veterans," as does the CSRA. "Preference eligibles" include persons who served in the armed forces during a war, persons who became disabled while serving on

service employees other than veterans were not given the right to appeal to the Commission by statute, but that right was extended to them by Executive Order No. 11,491, § 22, *reprinted in* 5 U.S.C. (1976 ed.) 7301 note, at 580. Judicial review of adverse actions was not provided by statute, but, as the Senate Report on the CSRA noted, "[c]urrently employees who wish to challenge Commission decisions generally file their claims with U.S. District Courts" (S. Rep. 95-969, *supra*, at 63). Those courts provided review under the APA. See, *e.g.*, *Polcover* v. *Secretary of Treasury*, 477 F.2d 1223 (D.C. Cir.), cert. denied, 414 U.S. 1001 (1973). Review was also provided in the former Court of Claims (although the congressional reports on the CSRA did not refer to review there) under standards similar to those established by the APA. See, *e.g.*, *Wathen* v. *United States*, 527 F.2d 1191 (Ct. Cl. 1975), cert. denied, 429 U.S. 821 (1976).

The Senate Report on the CSRA expressed strong congressional dissatisfaction with that situation. The Report said that there was a "widely held impression * * * that a government employee cannot be fired, regardless of unacceptable conduct or work performance" (S. Rep. 95-969, *supra*, at 9). The Report commented that "while it is technically possible to fire unsatisfactory employees, appeals processes are so lengthy and complicated that managers often avoid taking disciplinary action" (*ibid.*). The Report stated that, given the large number of district courts, there were "wide variations in the kinds of decisions

active duty in the armed forces, and, in certain circumstances, spouses and parents of such persons. See 5 U.S.C. 2108(3). We use the term "veteran," as did the court of appeals, to mean "preference eligible" as defined in Section 2108(3).

which have been issued on the same or similar matters" (*id.* at 63), and it stated that the Senate bill proposed to cure that deficiency by providing for review of orders issued by the MSPB in the courts of appeals rather than the district courts (*ibid.*). The Senate also expressed its displeasure with decisions overturning adverse actions on inadequate grounds, stating that "the Board and the courts should only reverse agency actions under the new procedures where the employee's rights under this title have been substantially prejudiced" (*id.* at 51; see also *id.* at 64).

2. The CSRA made sweeping changes. It abolished the Civil Service Commission, replacing it with the Office of Personnel Management (OPM), which has "central responsibility for executing, administering, and enforcing civil service rules and regulations" (S. Rep. 95-969, *supra*, at 5; see 5 U.S.C. 1104-1105), and the MSPB, which was vested with authority "to adjudicate employee appeals and protect the merit system" (S. Rep. 95-969, *supra*, at 2; see 5 U.S.C. 1205). To reduce variation in decisions, the CSRA provides for review of MSPB orders not involving claims of discrimination only in the Federal Circuit.[9] To stop reversals of agency actions on

[9] The House version of what became the CSRA provided for review of MSPB decisions in the district courts. H.R. 11280, 95th Cong., 2d Sess. 66 (1978). The Conference adopted the Senate's approach, which called for review in the regional courts of appeals and the former Court of Claims. H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 143 (1978). Under the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 127(a), 96 Stat. 37, the Federal Circuit has virtually exclusive jurisdiction of appeals from decisions of the Board other than appeals involving claims of discrimination. 5 U.S.C. 7703(b) (Pet. App. 38a-39a).

inadequate grounds, the CSRA contains a "harmful error rule" providing that adverse actions should be sustained, despite procedural errors, unless the errors prejudiced the employee. 5 U.S.C. 7701(c)(2)(A); see *Cornelius* v. *Nutt*, 472 U.S. 648, 657-658 (1985); 5 C.F.R. 1201.56(c)(3).

The CSRA provisions governing adverse actions are comprehensive. The statute created a new procedure under which actions could be taken against employees whose work performance was unacceptable in Chapter 43 of Title 5; it revised the procedures in Chapter 75 of Title 5 relating to adverse actions taken to promote the efficiency of the service; and it created a new Office of Special Counsel of the MSPB (5 U.S.C. 1206) to investigate allegations that agencies had committed "prohibited personnel practices" (5 U.S.C. 2302), which are certain specified practices "infected by particularly heinous motivations or disregard of law" (*Carducci* v. *Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983)). Each of these three provisions contains an express indication of how excepted service employees are to be treated and makes it clear that they were deliberately denied judicial review of personnel actions taken against them.

Chapter 43, 5 U.S.C. (& Supp. III) 4301 *et seq.*, for which there was no predecessor, deals with employee performance. It requires agencies to evaluate employees' performance in light of the "critical elements" of their jobs. It authorizes removal or reduction in grade on account of unacceptable performance and sets forth the rights of employees who are removed or reduced in grade for unacceptable performance. Chapter 43 defines "employee," for purposes of that chapter, to *include* personnel in the excepted

service. 5 U.S.C. 4301(2) (Pet. App. 31a-32a).[10] Accordingly, excepted service personnel who are subject to actions under Chapter 43 have specified rights, including the right to notice, to representation by an attorney, and to "a reasonable time to answer orally and in writing" (see 5 U.S.C. 4303(b) (Pet. App. 32a-33a)). Chapter 43 then provides that "[*a*]*ny employee who is a* [*veteran*] *or is in the competitive service*" may appeal a removal or reduction in grade under Chapter 43 to the MSPB. 5 U.S.C. 4303(e) (emphasis added) (Pet. App. 33a-34a). But Chapter 43 gives non-veterans in the excepted service no such right of appeal to the MSPB. Decisions of the MSPB are appealable to the Federal Circuit under 5 U.S.C. 7703 (Pet. App. 38a-39a),[11] but since the Chapter 43 rights of non-veterans in the excepted service do not include review by the MSPB, they of course do not include a right to appeal to the Federal Circuit.

---

[10] Congress gave OPM authority to exempt particular excepted service positions from any coverage at all under Chapter 43. 5 U.S.C. 4301(2)(G) (Pet. App. 32a). It added, however, that "[i]t is expected that this authority to exempt * * * positions will be used sparingly" (S. Rep. 95-969, *supra*, at 41).

[11] There is a separate provision for judicial review of allegations of discrimination. 5 U.S.C. 7703(b)(2) provides that cases involving allegations of discrimination brought by federal employees are to be filed as provided in Section 717(c) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), Section 15(c) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 633a(c), and Section 16(b) of the Fair Labor Standards Act of 1938, 29 U.S.C. 216(b), as applicable. The prior section, 5 U.S.C. 7702, carefully integrates cases involving such claims, and cases arising under the Rehabilitation Act of 1973, 29 U.S.C. 206(d), into the scheme of review by the MSPB. Excepted service employees are entitled to bring discrimination charges under these statutes, but no such allegation is involved in this case.

Chapter 75, 5 U.S.C. (& Supp. III) 7501 *et seq.*, governs adverse personnel actions other than removals or reductions in grade for unacceptable performance under Chapter 43.[12] It was revised substantially by the CSRA. Congress divided Chapter 75 into two subchapters, one governing minor adverse actions, defined as suspensions for 14 days or less (5 U.S.C. (& Supp. III) 7501 *et seq.* (Pet. App. 34a-35a)), and another governing major adverse actions, including removals, demotions, and suspensions for more than 14 days (5 U.S.C. 7511 *et seq.* (Pet. App. 36a-38a)). Subchapter I of Chapter 75, which relates to minor adverse actions, defines "employee" as "an individual in the competitive service who is not serving a probationary or trial period" (5 U.S.C. 7501(1) (Pet. App. 34a)), and thus excludes all excepted service employees from its coverage. It provides certain procedural rights in connection with minor adverse actions (suspensions for 14 days or less), but these rights do not include review by the MSPB or any court of such actions.

Subchapter II of Chapter 75, governing major adverse actions, authorizes agencies to take such actions "for such cause as will promote the efficiency of the service" (5 U.S.C. 7513(a)). It defines "employee"

[12] Chapter 75 differs from Chapter 43 in that all adverse actions under Chapter 43 relate to inadequate job performance as measured by ratings of performance on the critical elements of employees' jobs, whereas actions taken under Chapter 75 may relate to inadequate job performance or be based on other sorts of inadequacies, including misconduct. See *Lovshin* v. *Department of Navy*, 767 F.2d 826 (Fed. Cir. 1985), cert. denied, No. 85-882 (Apr. 7, 1986). The basis for the adverse action here, repeated misuse of a government vehicle, is the sort of action that would arise under Chapter 75 in a case involving a competitive service employee or a veteran.

to include "an individual in the competitive service who is not serving a probationary or trial period" and "a [veteran] in the excepted service" (5 U.S.C. 7511(a)(1) (Pet. App. 36a)). Thus, non-veterans in the excepted service are not "employees" for purposes of Subchapter II of Chapter 75.[13] Subchapter II provides that "an employee against whom [a major adverse] action is taken * * * is entitled to appeal to the Merit Systems Protection Board" (5 U.S.C. 7513(d) (Pet. App. 38a)). As noted above (at note 11, *supra*, and accompanying text), decisions of the MSPB other than in cases involving allegations of discrimination are appealable to the Federal Circuit under 5 U.S.C. 7703 (Pet. App. 38a-39a).

It is clear that Congress intended to deny non-veterans in the excepted service the protections of Subchapter II of Chapter 75 because Congress specifically provided for the extension of its provisions to selected employees in that category. Congress authorized OPM to provide for the application of Subchapter II of Chapter 75 to personnel in "any position or group of positions excepted from the competitive service" (5 U.S.C. 7511(c) (Pet. App. 36a)). As the Senate Report recognized, the purpose of Section 7511(c) was to authorize OPM "in its discretion, to extend adverse action and appeal coverage to positions or groups of positions" in the excepted service (S. Rep. 95-969, *supra*, at 49).[14] With two excep-

[13] Probationary employees are not "employees" under Chapter 75 either. Nearly all employees appointed to career positions in the civil service serve a one-year probationary period. See 5 C.F.R. Pt. 315, Subpt. H.

[14] OPM is not authorized to extend the protections of Chapter 75 to excepted service employees in positions "of a confidential, policy-determining, policy-making or policy-advocat-

tions [15] OPM has not chosen to do so.[16] Therefore, non-veterans in the excepted service have no right to appeal adverse actions of the sort governed by Chapter 75 to the MSPB or to obtain judicial review of the resulting decisions in the Federal Circuit.

---

ing character" (5 U.S.C. 7511(b)(2) (Pet. App. 36a)). OPM may only extend coverage under Subchapter II to employees whose positions are placed in the excepted service because it is not practical to hold competitive examinations for those positions. See S. Rep. 95-969, *supra*, at 48-49.

[15] The Office has provided by regulation that two types of excepted service personnel other than veterans have the rights enumerated in Chapter 75. 5 C.F.R. 752.401(b)(3) ("an employee with competitive status who occupies a position in Schedule B of Part 213 of this title") and 5 C.F.R. 752.401(b)(4) ("[a]n employee who occupies a professional and administrative career (PAC) position in Schedule B of Part 213 of this title").

[16] The Chairman of the Civil Service Commission, testifying at the hearings leading to the enactment of the CSRA, recognized that under Section 7511(c) as proposed (and enacted) "the Office of Personnel Management is authorized to extend adverse action and appeals coverage to positions administratively excepted from the competitive service." *Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings on S. 2640, S. 2707, and S. 2830 Before the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 99 (1978) (statement of Alan K. Campbell). He added that "[p]resently, employees in the excepted service (other than those entitled to veteran preference) are entitled to only those rights which may be provided by agency regulations, without the right of appeal to the Civil Service Commission" (*id.* at 99-100). Thus, it seems clear that Congress understood, as Chairman Campbell stated, that under the CSRA non-veterans in the excepted service would have the right to appeal only if OPM so provided. Respondent pointed out (Br. in Opp. 18-20) that Campbell's personal view was that career employees in the excepted service ought generally to be treated like competitive service employees. However, OPM has not thus far agreed. See note 15, *supra*.

Finally, in enacting the CSRA, Congress created the Office of Special Counsel of the MSPB (5 U.S.C. 1204) to investigate "[p]rohibited personnel practices" (5 U.S.C. 2302), which are certain specified practices such as coercion of political activity (5 U.S.C. 2302(b)(3)) and nepotism (5 U.S.C. 2302(b)(7)). Employees in excepted service positions, except for those employees in positions of a confidential or policy-making nature, *are* protected by the prohibited personnel practices provision (5 U.S.C. 2302(a)(2)(B) (Pet. App. 30a-31a)). The Special Counsel is authorized to investigate charges brought by excepted service personnel alleging that they have been subjected to prohibited personnel practices (5 U.S.C. 1206). Judicial review of actions taken or not taken by the Special Counsel is quite limited (*Carducci*, 714 F.2d at 175).

In sum, the CSRA comprehensively governs the procedures under which federal employees, including excepted service employees, may be subjected to adverse personnel actions, and the CSRA comprehensively regulates the right of federal employees, including excepted service employees, to obtain judicial review of adverse actions. Chapter 43 grants all non-probationary federal employees certain procedural rights in actions based on unacceptable job performance, but it provides for review by the MSPB and then the Federal Circuit only in cases involving competitive service employees and veterans in the excepted service. Chapter 75 grants rights with respect to other adverse actions. Subchapter I of Chapter 75 excludes minor adverse actions from review by the MSPB or the courts. Subchapter II provides for judicial review of major adverse actions taken against competitive service employees and veterans in the excepted service, but it does not provide for judicial re-

view of major adverse actions taken against probationary employees and non-veterans in the excepted service. OPM is expressly authorized in its discretion to extend coverage under Subchapter II of Chapter 75, including the right to seek review of major adverse actions by the MSPB and then the Federal Circuit, to excepted service employees not holding policy-making positions, but OPM has not generally done so. Finally, excepted service employees other than those holding policy-making positions may complain to the Special Counsel if they are subjected to prohibited personnel practices.

3. Respondent plainly has no express right to judicial review under the comprehensive provisions of the CSRA. He was not disciplined for inadequate performance of the critical elements of his job, so the provisions of Chapter 43—which would have provided him with procedural rights, but no right to obtain review in the MSPB and the Federal Circuit—do not apply. As a non-veteran in the excepted service, he was not an "employee" under Chapter 75, and OPM has not extended the coverage of that section to his position, so he has no rights under that chapter. And he did not allege that he was subjected to a prohibited personnel practice, so he had no right to complain to the Special Counsel under Chapter 23.[17]

It is clear that respondent also has no implied right of action under the CSRA. This Court recently stated that "[w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its

[17] Since respondent has not alleged that he was subjected to discriminatory treatment, he could not have proceeded under any of the statutes that provide specific remedies for such claims (see note 11, *supra*).

legislative history, and the nature of the administrative action involved." *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 345 (1984). The Court emphasized that "'clear and convincing evidence'" of an intent to preclude review is not required "in the strict evidentiary sense" (*id.* at 350). Rather, "the presumption favoring judicial review of administrative action may be overcome by inferences of intent drawn from the statutory scheme as a whole" (*id.* at 349).[18] The comprehensive nature of the CSRA clearly precludes implication of a right of action under that statute.

The courts of appeals have uniformly concluded that federal employees have no implied rights of action under the CSRA. In *Schwartz* v. *Department of Transportation*, 714 F.2d 1581 (1983), the Federal Circuit concluded that a Department of Transportation attorney who had been dismissed under Chapter 43 for unacceptable performance could not obtain review in the MSPB, since attorneys are excepted service employees (see 5 C.F.R. 213.3102(d)). The Federal Circuit recently reaffirmed that conclusion in *Smith* v. *MSPB*, 813 F.2d 1216 (1987), where the court held that an attorney at the National Labor Relations Board who was dismissed for unacceptable performance could not appeal her dismissal to the MSPB, even though the applicable agency regulation appeared to grant her that right. The Federal Circuit also held in *United States* v. *Connolly*, 716 F.2d

[18] Cf. *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982) ("[i]n the context of the [Medicare] statute's precisely drawn provisions," Congress's failure to authorize further review of certain determinations "provides persuasive evidence that Congress deliberately intended to foreclose further review of such claims").

882 (1983) (en banc), cert. denied, 465 U.S. 1065 (1984), that a probationary employee who was dismissed could not obtain review under the CSRA since probationary employees, like excepted service employees, are not "employees" under Chapter 75. The District of Columbia Circuit has rejected a similar claim by a probationary employee. *Borrell* v. *United States International Communications Agency*, 682 F.2d 981 (1982). That court has also rejected a claim by an employee subjected to a minor adverse action that he had an implied right of action under the CSRA even though Chapter 75 does not provide for review of minor adverse actions. *Cutts* v. *Fowler*, 692 F.2d 138 (D.C. Cir. 1982). Finally, that court recently concluded that an excepted service attorney at the Department of Health and Human Services who was dismissed for unsatisfactory performance had no implied right of action under the CSRA. *Harrison* v. *Bowen*, No. 86-5168 (D.C. Cir. Apr. 3, 1987), slip op. 21). There is, accordingly, no question that the MSPB and the Federal Circuit correctly rejected respondent's prior attempt to obtain review in those bodies (see Pet. App. 27a; *Fausto* v. *Department of Interior*, 738 F.2d 454 (Fed. Cir. 1984) (Table)).

C. As Other Courts Of Appeals Have Recognized, The CSRA Preempts Recovery Under More General Statutes

In view of the CSRA's comprehensive scheme of administrative and judicial review, other courts of appeals that have considered whether a variety of personnel actions not subject to review under the CSRA may be reviewed under more general statutes have all answered in the negative.[19] In *Veit* v. *Heck-*

[19] Similarly, in *Bush* v. *Lucas*, 462 U.S. 367 (1983), this Court held that a federal employee with a right to administrative and judicial review of his demotion could not sue his superiors for damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Court noted that Congress had provided "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations," and determined that this system precluded a *Bivens* remedy (462 U.S. at 388). The courts of appeals have split on the question whether employees with no right to judicial review under the CSRA may pursue *Bivens* actions. Compare *Kotarski* v. *Cooper*, 799 F.2d 1342 (9th Cir. 1986) (probationary employee may pursue *Bivens* action), and *Spagnola* v. *Mathis*, 809 F.2d 16 (D.C. Cir. 1986) (federal employee subjected to a minor adverse action may pursue *Bivens* action), with *Pinar* v. *Dole*, 747 F.2d 899 (4th Cir. 1984) (federal employee subjected to a minor adverse action may not pursue *Bivens* action), and *Hubbard* v. *EPA*, 809 F.2d 1 (D.C. Cir. 1986) (unsuccessful job applicant with limited remedies under the CSRA may not pursue *Bivens* action). The Solicitor General has authorized the filing of a petition for a writ of certiorari in *Kotarski*.

ler, 746 F.2d 508, 511 (9th Cir. 1984), the court stated that "the comprehensive nature of the procedures and remedies provided by the CSRA indicates a clear congressional intent to permit federal court review as provided in the CSRA or not at all." Accordingly, that court held that the existence of the CSRA precluded review by a district court under the APA of an employee's performance evaluation. Similarly, the court in *Pinar* v. *Dole*, 747 F.2d 899 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985), held that a federal employee suspended for two days had no right to review of his suspension in a district court. That was so, according to the Fourth Circuit, because APA review is not available "where the relevant statute 'preclude(s) judicial review,'" and "the statutory scheme of the CSRA reveals that Congress intentionally foreclosed judicial review to employees

who * * * are subjected to disciplinary actions which are modest in nature by providing judicial review only of [major] personnel actions" (747 F.2d at 912 (quoting 5 U.S.C. 701(a)(1)). In *Carducci* v. *Regan*, 714 F.2d 171, 173-174 (D.C. Cir. 1983), the court held that, by its enactment of the CSRA, Congress precluded review of minor personnel actions that, prior to the CSRA's passage, were reviewable under the APA. Finally, in *Harrison* v. *Bowen*, No. 86-5168 (D.C. Cir. Apr. 3, 1987), slip op. 21-22, the court concluded that an excepted service employee had no right to judicial review under the APA of her dismissal for unacceptable performance.[20] See also *Broadway* v. *Block*, 694 F.2d 979, 986 (5th Cir. 1982) (no APA jurisdiction to review reassignment).[21]

---

[20] The court in *Harrison* treated the question whether an excepted service employee had an implied right of action under the CSRA to challenge an adverse action taken under Chapter 43 together with its treatment of the question whether the CSRA preempted her right to review under the APA (see slip op. 9-23). It concluded that excepted service employees have no right to judicial review under either the CSRA or the APA for the same reason—the text of Chapter 43 makes clear that Congress "intended to foreclose district court review" of such claims (slip op. 21).

[21] Other courts have held that review is not available under other general statutes. See, *e.g.*, *Spagnola* v. *Mathis*, 809 F.2d 16, 28-30 (D.C. Cir. 1986) (federal employee who was not promoted could not bring claim under 42 U.S.C. 1985(1)); *Weatherford* v. *Dole*, 763 F.2d 392 (10th Cir. 1985) (no jurisdiction under 28 U.S.C. 1331 to review reassignment of government employee). Two courts came to contrary conclusions concerning whether classification claims are reviewable. Compare *Burroughs* v. *OPM*, 764 F.2d 1300 (9th Cir. 1985) (authorizing mandamus review of classification claims), with *Barnhart* v. *Devine*, 771 F.2d 1515 (D.C. Cir. 1985) (employees complaining of improper classification must bring their claim to the Special Counsel). But classification claims are not claims based on adverse actions. We are aware of no court other than the court below that has held that an adverse action may be reviewed under a statute other than the CSRA. In *Dugan* v. *Ramsay*, 727 F.2d 192, 194-195 (1st Cir. 1984), the court authorized review under the APA of a job applicant's claim that OPM had arbitrarily refused to consider his application, and rejected an argument that the CSRA precluded review in reaching that decision, but that case did not involve an adverse action.

The Federal Circuit had also previously recognized that the CSRA precluded review under the Tucker Act, holding in *McClary* v. *United States*, 775 F.2d 280 (1985), that a competitive service employee who had a remedy under the CSRA could not seek back pay under the Tucker Act. And the Federal Circuit recently held that a probationary employee had no claim under the Tucker Act. *Rosano* v. *United States*, 800 F.2d 1126 (1986) (per curiam). In sum, except for the decision below, the courts of appeals have held without exception that the comprehensive provisions of the CSRA preclude federal employees from obtaining review of adverse personnel actions under more general statutes.

D. The Fact That Respondent Cannot Obtain Judicial Review Under The CSRA Precludes, Rather Than Supports, Permitting Him To Bring Suit Under The Tucker Act

The court below concluded that the decisions of other circuits holding that federal employees may not sue under more general statutes are inapplicable in this case because non-veterans in the excepted service are "not subject to the adverse action provisions

of the CSRA" (Pet. App. 22a).[22] It similarly concluded that its own prior decision in *McClary* was inapplicable because, while the CSRA provided an avenue for obtaining judicial review to the competitive service employee in that case, the CSRA does not provide an avenue for obtaining judicial review to respondent (*id.* at 5a). But the statement that excepted service employees are not subject to the adverse action provisions of the CSRA was plain error:

[22] The court of appeals cited (Pet. App. 4a) this Court's decision in *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), in which the Court held that the Rail Act did not preclude railroads from pursuing takings claims under the Tucker Act, stating that "[t]he question * * * is whether Congress has in the Rail Act *withdrawn* the Tucker Act grant of jurisdiction to the Court of Claims to hear a suit involving the Rail Act 'founded * * * upon the Constitution'" (*id.* at 126 (emphasis in original)). But that case is not in point here. First, it was assumed *arguendo* in that case that the operation of the Rail Act would give rise to a valid constitutional claim; the question was whether the same statute had simultaneously closed the door to the courthouse. Here, it is clear that respondent has no constitutional claim and the only question is whether, in light of the CSRA, he has any statutory claim. Second, in the Rail Act case the Court reviewed the text and legislative history of the Rail Act, particularly its own statement of its relationship to other laws (see *id.* at 129), and concluded that Congress had not intended to preclude suit under the Tucker Act—a conclusion explicitly fortified by the Court's determination that "[t]here are clearly grave doubts whether the Rail Act would be constitutional if a Tucker Act remedy were not available" (*id.* at 134). Here, as we have shown, the text and legislative history clearly demonstrate that Congress *did* intend the comprehensive CSRA remedies to be exclusive (*i.e.*, that it did intend to "withdraw the subject from the operation of a general law" (*Cook County National Bank*, 107 U.S. at 451)), and there is of course no doubt that Congress acted constitutionally in doing so.

as demonstrated above, excepted service employees were dealt with advertently in all relevant provisions of the CSRA and were deliberately afforded some but not all of the remedies available to other employees. The conclusion below—that, because Congress has granted excepted service employees only limited rights under the CSRA, they should be granted rights under other statutes that the court acknowledged are not granted to competitive service employees and veterans—inverts the proper principles of statutory construction. As usual with such inversions, the court's decision would lead to an anomalous result: preferential treatment of a class of employees Congress plainly intended to treat less favorably than competitive service employees.

The premise for the court's decision—that excepted service employees are not subject to the adverse action provisions of the CSRA—is just wrong. Congress granted excepted service personnel limited rights (not including the right to obtain judicial review) under Chapter 43, so that they are covered by the provisions of the CSRA relating to adverse actions taken because of unacceptable job performance. Congress also dealt advertently with non-veterans in the excepted service in Chapter 75 by excluding them from coverage but providing that OPM could extend the rights enumerated in Subchapter II of Chapter 75, relating to major adverse actions, to them. Furthermore, Congress included certain excepted service positions in the definition of "covered positions" in the prohibited personnel practices provision, so that most excepted service employees may complain to the Special Counsel if they are subjected to an adverse action in violation of that provision. See pages 16-22, *supra*.

This careful and comprehensive scheme demonstrates that, with limited exceptions, Congress simply did not want to give non-veteran excepted service personnel the right to judicial review of adverse actions. It could hardly be plainer that personnel such as respondent were not forgotten by the drafters of the CSRA. Rather, they were deliberately granted fewer rights than competitive service employees and veterans, by a Congress concerned that "appeals processes are so lengthy and complicated that managers often avoid taking disciplinary action" (S. Rep. 95-969, *supra*, at 9).

It is not at all surprising that Congress intended employees in the excepted service to have limited rights in adverse action proceedings, since "it is well established that an employing agency is free to discharge excepted service employees without cause" (*Chu* v. *United States*, 773 F.2d 1226, 1228 n.2 (Fed. Cir. 1985)) and "without either a statement of reasons for discharge or adverse action appeal rights" (*Fowler* v. *United States*, 633 F.2d 1258, 1262 (8th Cir. 1980)), in the absence of a statute or regulation providing to the contrary.[23] It is therefore not surprising that Congress granted them lesser procedural rights under the CSRA.[24]

[23] Here respondent was provided with a statement of the charges against him, permitted to reply to them, and later permitted to file a grievance challenging the decision to dismiss him. Pet. App. 25a. Respondent has not alleged that he had a property interest in his position, and it seems clear that excepted service employees, who may generally be fired for any reason and without any procedure, have no such interest. *Crisan* v. *United States*, 223 Ct. Cl. 682 (1980) (attorney given right to reply to charges before his dismissal had no property interest in his excepted service position). But, assuming that he had such an interest, the rights granted him satisfied due process. See *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985); cf. *Harrison* v. *Bowen*, No. 86-5168 (D.C. Cir. Apr. 3, 1987), slip op. 27-29.

In light of Congress's clear intent to grant only limited rights to excepted service employees, it makes no sense to grant them greater rights under the Tucker Act or the APA than are afforded competitive service employees. That point was forcefully made by the court in *Harrison* v. *Bowen*, No. 86-5168 (D.C. Cir. Apr. 3, 1987), which very recently concluded that excepted service employees, like competitive service employees, are precluded from seeking relief for adverse actions under the APA. The court noted that the CSRA grants excepted service employees limited rights, and added that "[r]ights so conditionally held are no less rights for the condition, but it would be curious indeed if they were favored with greater engines for enforcement than other rights more firmly vested elsewhere in the same Act" (slip op. 21). Thus, the very fact on which the court below relied in purporting to distinguish this case from the decisions of other circuits—that federal employees other than non-veterans in

[24] Unsurprisingly, the CSRA also gives probationary employees very limited rights. Probationary employees, by definition, lack job tenure, and it would be almost a contradiction in terms to erect procedures that make it difficult to dismiss or otherwise discipline probationary employees. See S. Rep. 95-969, *supra*, at 45 (stating, in explaining why probationary employees are not covered by Chapter 43, that "[t]he probationary or trial period * * * is an extension of the examining process * * * [so that it] is inappropriate to restrict an agency's authority to separate an employee who does not perform acceptably during this period"). Nor is it surprising that Congress has provided limited remedies for minor adverse actions. It simply does not make sense to provide elaborate procedural remedies for adverse actions with limited consequences, making the cure more expensive than the disease.

the excepted service are granted more extensive remedies under the CSRA—does not support the conclusion that respondent should be permitted to proceed under the Tucker Act, but instead demonstrates that Congress did not want such employees to be able to obtain judicial review. Since it is plain that the CSRA provides the exclusive remedy for adverse actions taken against competitive service employees, as other courts of appeals have held without exception (see pages 24-27, *supra*), it is even plainer that it is the exclusive remedy for those employees granted only more limited rights under the CSRA. That means that excepted service personnel simply cannot obtain judicial review of adverse personnel actions not involving claims of discrimination, unless OPM extends such protection to them, but that is what Congress intended.[25]

---

[25] The court of appeals noted (Pet. App. 3a, 19a) that this Court held in *Service* v. *Dulles*, 354 U.S. 363 (1957), and *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), that agencies are bound to follow their own regulations and that judicial review is normally available to compel an agency to comply with its regulations. As the court of appeals in *Harrison* recently concluded (slip op. 23-26), in holding that an excepted service employee could not obtain review of a claim that an agency had violated its regulations in dismissing her, the principle that judicial review is available to compel an agency to comply with its regulations does not apply where, as here, the applicable statute precludes judicial review. That is because '"no [agency] rules, understandings or circumstances can contravene the intent of the legislature regarding the employment entitlements that can be conferred'" (*id.* at 24 (quoting *Carducci*, 714 F.2d at 177)). As the court in *Harrison* further explained, neither *Service* nor *Vitarelli* involved regulations that "implemented a statutory scheme that itself precluded the plaintiffs from obtaining judicial review of the rights created both therein and thereunder" (*Harrison*, slip op. 25); to the contrary, in both cases judicial "enforcement of the rights created in the regulations did not conflict with the known intent of Congress" (*id.* at 25-26).

If judicial review of any sort were available to compel an agency to follow its regulations, the sort of review that would be appropriate would be limited review under the Mandamus Act, 28 U.S.C. 1361. Under that provision, a plaintiff may obtain relief only when he has a clear right to relief, the defendant has a clear duty to act, and no other adequate relief is available. See, *e.g.*, *Hadley Memorial Hospital, Inc.* v. *Schweiker*, 689 F.2d 905 (10th Cir. 1982); *Jones* v. *Alexander*, 613 F.2d 314 (5th Cir.) (Table), cert. denied, 449 U.S. 832 (1980).

[26] In *Harrison* the plaintiff had an arguable claim that her dismissal was based on a prohibited personnel practice, so that the Special Counsel procedure was available to her. Respondent has no claim that he was subjected to a prohibited personnel practice. However, the fact that it is not possible to argue that, in taking action against respondent, FWS committed any one of the 11 broadly-phrased prohibited personnel practices enumerated in 5 U.S.C. 2302(b) is not a reason to permit him to obtain review under the Tucker Act, a right denied all employees who can make any claim for relief under the CSRA. Rather, as the court in *Harrison*

The court in *Harrison* reached the conclusion that excepted service employees are barred from obtaining judicial review in a situation that is almost exactly on point. The plaintiff in that case was an excepted service employee of the Department of Health and Human Services who had been dismissed under Chapter 43 for unacceptable performance of her job as an attorney. The court noted that under the CSRA her only avenue for obtaining judicial review was to complain to the Special Counsel (which she had not done) that her dismissal was a prohibited personnel practice because it violated merit system principles. The court held that in spite, or because, of the severe limitation on her CSRA remedies she was barred from obtaining review under the APA.[26]

The court of appeals in *Carducci* v. *Regan*, 714 F.2d 171 (D.C. Cir. 1983), also correctly handled a question parallel to the present case. *Carducci* involved a claim that a federal employee had been improperly reassigned, although the reassignment did not involve a reduction in grade or pay. The court recognized (*id.* at 174 n.1) that, prior to the enactment of the CSRA, it had reviewed such claims under the APA and that, if review under the APA were not authorized, the employee would not be able to obtain judicial review (*id.* at 175). The court nevertheless held that "the CSRA implicitly *eliminated* a right of action that previously existed" (*id.* at 173 (emphasis in original)), reasoning that "failure to include some types of nonmajor personnel action within the remedial scheme of so comprehensive a piece of legislation reflects a congressional intent that no judicial relief be available" (*id.* at 174 (footnote omitted)). The court further stated that, otherwise, "the exhaustive remedial scheme of the CSRA would be impermissibly frustrated by permitting, for lesser personnel actions not involving constitutional claims, an access to the courts more immediate and direct than the statute provides with regard to major adverse actions" (*ibid.*). The court explained that it would make no sense to permit "the luxury of immediate judicial review, without any resort to the administrative process established by the statute," for minor adverse actions (*id.* at 174-175).

It is similarly anomalous to hold, as the court below did, that excepted service personnel need not pursue any administrative appeal before the MSPB,

---

stated, it would be "curious" if he was "favored with greater engines for enforcement than other rights more firmly vested elsewhere in the same Act" (slip op. 21).

as competitive service employees and veterans must, but may proceed directly to the Claims Court. Moreover, on the reasoning of the court below it is not even clear that this anomalous result would be limited to excepted service employees. The court below stated that the prior decision in *Greenway*, on which it relied, provided a Tucker Act remedy for a *probationary* excepted service employee (Pet. App. 3a-4a), which suggests that probationary employees could also proceed directly to the Claims Court.[27] Furthermore, there is no obvious basis for distinguishing claims by excepted service employees from claims resulting from minor adverse actions. The logic that says that prior rights of action are not extinguished

---

[27] The court of appeals appeared to recede from that conclusion somewhat in its decision on rehearing. It stated that the decision in *United States* v. *Connolly*, 716 F.2d 882 (Fed. Cir. 1983) (en banc), cert. denied, 465 U.S. 1065 (1984), holding that a probationary employee had no right to judicial review, was based on "legislative history which specifically revealed the intent of Congress not to grant a cause of action under the CSRA to probationary employees," and suggested that Congress might have intended to bar probationary employees from obtaining judicial review under more general statutes as well (Pet. App. 21a). And the Federal Circuit recently held that a probationary employee could not pursue a challenge to a dismissal under the Tucker Act because the CSRA comprehensively enumerates the remedies available to probationary employees. *Rosano* v. *United States*, 800 F.2d 1126 (1986) (per curiam). Since Congress excluded probationary employees and excepted service employees from the coverage of Subchapter II of Chapter 75 in the same subsection (5 U.S.C. 7511(a)(1) (Pet. App. 36a)), it is contradictory to hold that non-veterans in the excepted service may pursue Tucker Act claims challenging major adverse actions while probationary employees may not. Rather, the text and structure of Chapter 75 show that neither non-veterans in the excepted service nor probationary employees are entitled to judicial review for claims of the sort covered by Chapter 75.

by the comprehensive scheme of the CSRA where the CSRA does not provide for judicial review would imply that the court of appeals in *Carducci* erred in concluding that competitive service employees may not proceed directly to court under the APA to challenge minor adverse actions.

Congress did not intend such anomalous results. It is plain from the structure of the CSRA that Congress intended generally to bar excepted service employees—and probationary employees and employees subjected to minor adverse actions—from obtaining judicial review of adverse actions, except in the ways enumerated in the CSRA.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LOUIS R. COHEN
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

DAVID M. COHEN
ROBERT A. REUTERSHAN
Attorneys

APRIL 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40303

RESPONDENT'S

BRIEF

Supreme Court, U.S.
FILED
JUL 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-595

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,
Petitioner,

v.

JOSEPH A. FAUSTO

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

---

BRIEF FOR THE RESPONDENT

JOSEPH ANTHONY FAUSTO
1111 Arlington Boulevard
W-310
Arlington, Virginia 22209
(703) 528-2746
Appearing pro se

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

BEST AVAILABLE COPY

QUESTION PRESENTED

The Tucker Act, as amended by the Federal Courts Improvement Act of 1982, and the Back Pay Act, as amended by the Civil Service Reform Act of 1978 (CSRA), provide a specific remedy for federal civil service personnel who, although not defined in Chapter 75 of the CSRA, are discharged in violation of agency regulations which apply to them. The question presented is whether a federal employee who, after being wrongfully discharged from tenured employment without a hearing in violation of agency regulations, is not restored to the same position he would have been in had he not been wrongfully discharged, may obtain judicial review of agency compliance with the make-whole terms of the Back Pay Act in the Claims Court under the Tucker Act.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT	1
SUMMARY OF ARGUMENT	10
ARGUMENT	
A FEDERAL EMPLOYEE WHO HAS BEEN WRONGFULLY DISCHARGED, BUT NOT RESTORED, MAY OBTAIN JUDICIAL REVIEW OF AGENCY COMPLIANCE WITH THE BACK PAY ACT IN THE CLAIMS COURT UNDER THE TUCKER ACT	12
A. The CSRA Did Not Eliminate The Tucker Act/Back Pay Act Remedy For Employees Not Covered By The CSRA	12
B. In The Tucker Act And Back Pay Act, Congress Specifically Provided The Appropriate Remedy In This Case	16
C. Equity Requires That Wrongfully Discharged Employees Be Made Whole	21
CONCLUSION	25

TABLE OF AUTHORITIES

CASES:	Page
Block v. *Community Nutrition Institute*, 467 U.S. 340 (1984)	9
Bush v. *Lucas*, 462 U.S. 367 (1983)	7, 20, 24
Edwards v. *California*, 314 U.S. 168 (1941)	25
Georgia v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945)	14
Lindahl v. *OPM*, 470 U.S. 768 (1985)	10, 12-13
Morton v. *Mancari*, 417 U.S. 535 (1974)	7
Phelps Dodge v. *National Labor Relations Board*, 313 U.S. 177 (1941)	24
Sampson v. *Murray*, 415 U.S. 61 (1974)	20
Service v. *Dulles*, 354 U.S. 363 (1957)	7, 15, 21
United States v. *Erika, Inc.*, 456 U.S. 201 (1982)	9
United States v. *Perkins*, 116 U.S. 483 (1886)	24
United States v. *Testan*, 424 U.S. 392 (1976)	8
United States v. *Wickersham*, 201 U.S. 390 (1906)	24
Vitarelli v. *Seaton*, 359 U.S. 535 (1959)	7, 11, 21, 23
Watson v. *United States*, 137 C.Cls. 557 (1956)	15
Watson v. *United States*, 142 Ct.Cl. 749 (1958)	9, 10, 15
Watson v. *United States*, 355 U.S. 14 (1957)	15
Wicker v. *Hoppock*, 6 Wall. (73 U.S.) 94 (1867)	24
Wood v. *United States*, 16 Pet. (41 U.S.) 342 (1842)	14
STATUTES AND REGULATIONS:	
Back Pay Act:	
5 U.S.C. 5596	*passim*
Back Pay Act of 1948, Pub. L. No. 623, 62 Stat. 354	10, 16
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111	*passim*
Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 37	10, 12
5 U.S.C. 5724(a)(1)	2
31 U.S.C. 638(c)(2) (1976 ed.)	4
31 U.S.C. 1349(b)	4
Tucker Act:	
28 U.S.C. 1491	*passim*
5 C.F.R. 351.603 (1981)	5
5 C.F.R. 351.901 (1981)	5
5 C.F.R. Part 550 (1982)	25

STATUTES AND REGULATIONS - continued Page

5 C.F.R. 550.803 (1982) 20
5 C.F.R. Part 771 (1982) 18
5 C.F.R. 771.205 (1982) 18
5 C.F.R. 771.206(b) (1982) 18
771 Fed. Pers. Man. (1981) 19
370 DM 752 (1980) 22
370 DM 771 (1981) 3

MISCELLANEOUS:

Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings on S. 2640, S. 2707, and S. 2830 Before the Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess. (1978) 15
H.R. Rep. No. 32, 89th Cong., 1st Sess. (1965) 2, 17, 20
H.R. Rep. No. 97-312, 97th Cong., 1st Sess. (1981) .. 12, 13
S. Rep. No. 1062, 89th Cong., 2d Sess (1966) 17
S. Rep. No. 92-1066, 92d Cong., 2d Sess. (1972) 18
S. Rep. No. 95-969, 95th Cong., 2d Sess. (1978) 18
Story, Equity Pleading, Sec. 72 (1844) 20

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 783 F.2d 1020. The order of the court of appeals denying a petition for rehearing (Pet. App. 10a-23a) is reported at 791 F.2d 1554. The opinion of the United States Claims Court (Pet. App. 24a-29a) is reported at 7 Cl.Ct. 459.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9a) was entered on February 10, 1986. The court of appeals entered an order denying rehearing (Pet. App. 23a) on May 14, 1986. The petition for a writ of certiorari was filed on October 17, 1986, and was granted on January 12, 1987. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) (1982).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are set forth in the appendix to the petition for a writ of certiorari (Pet. App. 30a-39a), and in the government's brief ("Br. U.S."), at 3, n.2, and at 5, n.5.

STATEMENT

In the Back Pay Act of 1966, currently codified at 5 U.S.C. 5596 (1982), Congress specifically provided (H.R. Rep. No. 32, 89th Cong., 1st Sess. 5 (1965)) that "entitlement to backpay . . . is dependent upon the occurrence of the following situations:

> **"(A) An Official Personnel Action Has Been Taken Which Terminated Or Decreased All Or Part Of The Pay, Allowances, Or Differentials Of A Government Officer Or Employee"**

On January 8, 1978, the U.S. Department of the Interior (agency) transferred the respondent from his com-

petitive service position (in which he had earned career tenure in July, 1977) with another federal agency in New York "in the interest of the government" for "permanent duty" (within the meaning of the Administrative Expenses Act of 1946, currently codified at 5 U.S.C. 5724(a) (1)(1982)) as an administrative officer for its Young Adult Conservation Corps (YACC) headquarters office in Virginia (Br. App. 71) ("Br. App." refers to the appendix to respondent's brief filed in the court of appeals). The respondent was at that time promoted to a term position in the excepted service, an appointment which was for the duration of the YACC program, subsequently extended not to exceed September 30, 1982 (Pet. App. 1a-2a). Upon his appointment, respondent received from the agency a copy of a personnel management directive which stated that a "career employee" then "currently employed in the career service" who was selected "in the interest of the government" for a YACC management position would be granted "reemployment rights" back into the competitive service in a position "at a higher grade level due to experience gained [in the YACC appointment if] such a position is available" upon the expiration of the term of the YACC appointment (Br. App. 79-80).

In November, 1980, respondent was advised that the agency intended to dismiss him for a number of reasons, including an unsworn allegation that he had once used a government vehicle without authorization during an out-of-state assignment some eight months earlier (Br. App. 73). After replying to the charges in writing, respondent was removed from his position effective January 16, 1981, at which time the agency issued a Notification of Personnel Action which cited no "civil service or other legal authority" (Br. App. 38) as the basis for the action taken so

as to advise respondent of the proper forum if he wished to challenge it. The decision notice did not inform the respondent of "any applicable rights to a grievance procedure [under] 370 DM 771" (Br. App. 44), which included the right to an evidentiary hearing accorded to a "career-type" excepted service employee being "separated for cause" (Br. U.S. 3, n.2).

On September 18, 1981, the agency closed the office at which respondent was employed when he was removed, and thus abolished his former position over one year before the term of his appointment was due to expire (Br. App. 68-69).

> **"(B) Such Personnel Action Has Been Made The Subject Of Review By Appropriate Authority, Either Because Of A Timely Appeal On The Part Of Such Officer Or Employee Or Because The Appropriate Government Authority, On Its Own Initiative, Decided to Review Such Personnel Action"**

In February, 1982, in response to a Congressional inquiry initiated by respondent, the agency admitted that respondent had not been apprised of his grievance rights when he was removed, and submitted that, should the respondent prevail on his appeal, his removal would be cancelled (Br. App. 39-40). By letter dated March 22, 1982, over one year after removing respondent, the agency amended its January 2, 1981 decision notice, but neither invoked jurisdiction under its administrative grievance regulations by restoring respondent to the rolls so that his grievance could be legally adjudicated (Pet. App. 12a) nor alluded to its having abolished respondent's former position so as to restore the parties to the status quo ante (Br. App. 52).

"(C) Such Personnel Action Has Been Found By The Appropriate Government Authority To Be Unjustified Or Unwarranted"

The respondent filed a formal grievance with the agency in May, 1982. On June 30, 1982, the agency concluded, based on the administrative file without a hearing, that the respondent should not have been removed for cause, but instead should have been suspended for one month for what was characterized as "willfull" misuse of a government vehicle. Although it neither conducted a hearing nor obtained even one sworn statement to substantiate the charge, the agency cited 31 U.S.C. 638(c)(2) [currently codified at 31 U.S.C. 1349(b) (1982)] to justify a proposed constructive suspension (Br. App. 74). Instead of taking action to officially cancel the respondent's discharge (which by that time had been effected one and one-half years earlier) as "unjustified or unwarranted" (5 U.S.C. 5596(b)(1) (1982)), however, the agency offered to informally settle respondent's grievance by the proposed payment of back pay for part of the period during which he had been removed, *i.e.*, from the date his constructive suspension would have ended to the date the agency asserted—for the very first time to respondent—that his former position was abolished (Pet. App. 25a), on the condition that respondent would not appeal the offer to the agency's Office of Hearings and Appeals (OHA) (Br. App. 75). When respondent answered that he would accept the offer in part, but contended that he was entitled to additional relief under the terms of the Back Pay Act, 5 U.S.C. 5596 (1982) (Br. App. 77), the agency threatened to withdraw the entire offer, and later forwarded the grievance to the OHA (Br. App. 78), which, in November, 1982, issued a recommended decision, based on the grievance file without a hearing, affirming the agency's "offer of adjustment" (Br. App. 82).

Claiming that the agency's "offer of adjustment" still did not comply with the make-whole terms of the Back Pay Act, 5 U.S.C. 5596 (1982), respondent pursued his administrative claim to the agency's Director of Personnel, who issued a final order on behalf of the Secretary of the Interior upholding the agency's offer of partial back pay without reinstatement on the mistaken premise that respondent's proposed separation when his position was abolished would invoke neither reduction in force nor adverse action procedures requiring a hearing on the faulty ground that respondent's YACC appointment expired at the same time his position was abolished (Br. App. 83).

"(D) A Corrective Action, Consistent With Applicable Law Or Regulations, Has Been Authorized By The Appropriate Government Authority As A Consequence Of Its Decision"

On February 1, 1983, the agency (1) cancelled the respondent's removal under the authority of "5 U.S.C. 5596," but cited the June 30, 1982 offer as the final "order" directing same (Br. App. 49), (2) suspended respondent for one month for a "motor vehicle use violation" (Br. App. 86), and (3) terminated respondent involuntarily from the position to which he had just been restored, effective retroactively as of September 18, 1981, citing "Reg. 351.603" as authority for the action, implying that the respondent was properly separated after reduction in force procedures and had the opportunity to appeal to the U.S. Merit Systems Protection Board (Board) under its regulations, at 5 C.F.R. 351.901 (1981) (Br. App. 50). In March, 1983, respondent received the partial back pay award offered by the agency in June, 1982 (Pet. App. 25a-26a).

In February, 1983, respondent filed a complaint in the Claims Court, seeking back pay for the entire period during which his wrongful removal had been in effect. Invoking the court's jurisdiction under the Tucker Act, 28 U.S.C. 1491 (1982) (Br. App. 27), respondent moved for summary judgment on the ground that the agency failed to comply with the make-whole terms of the Back Pay Act, 5 U.S.C. 5596 (1982). The government filed a cross-motion for summary judgment, contending that the CSRA enumerated an all-inclusive catalogue of remedies for adverse personnel actions and therefore impliedly precluded judicial review of federal employee claims either in the Claims Court or any other judicial forum (Pet. App. 2a).

On February 28, 1985, the Claims Court granted the government's cross-motion for summary judgment. In a decision which did not mention the Tucker Act, the court held that the respondent "may not assert jurisdiction under the Back Pay Act for review of his claims in this court" (Pet. App. 27a). On the basis of the record, without any findings of fact, the court ruled that respondent was not entitled to additional back pay on the mistaken premises that (1) because respondent admitted "that he willfully misused a government vehicle," the agency was required by law to suspend him for at least one month, and (2) respondent possessed "no retention rights" to another position in the agency (Pet. App. 28a). The court concluded that "any procedural transgression by the government in handling [respondent's] administrative appeal is deemed to be harmless error" (Pet. App. 29a). In regard to the agency's compliance with the Back Pay Act, the court erroneously declared that respondent had received all pay and benefits to which he was entitled for the period of his wrongful discharge (Pet. App. 27a).

The U.S. Court of Appeals for the Federal Circuit reversed and remanded to the Claims Court for further proceedings. The court noted that, prior to the enactment of the CSRA, an employee in respondent's situation could have maintained a suit in the former Court of Claims, as an agency regulation granted the respondent certain rights and the agency was bound by its own regulation, citing *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), and *Service* v. *Dulles*, 354 U.S. 363 (1957), in support (Pet. App. 3a). The court held that respondent could seek redress of his administrative grievance in the Claims Court under the Tucker Act because, with respect to federal civilian employee suits concerning personnel actions, that court's historic Tucker Act/Back Pay Act jurisdiction to review such decisions had not been repealed by the CSRA due to the circumstance that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective," quoting this Court's decision in *Morton* v. *Mancari*, 417 U.S. 535 (1974) (Pet. App. 4a). Noting that this was not a case where an existing remedial system was being "augmented by the creation of a new judicial remedy" (*Bush* v. *Lucas*, 462 U.S. 367 (1983)), the court stated that "this case merely recognizes the remedy under the Tucker Act and the Back Pay Act which Congress created many years ago." The court therefore concluded that "[i]f a federal civilian employee is granted rights by an executive department regulation and if that employee is accorded no right of redress by appeal to the Board under the CSRA, then the CSRA does not operate to repeal the Tucker Act/Back Pay Act jurisdiction of the Claims Court" (Pet. App. 6a). On the merits, the court held that the respondent was entitled to back pay for the period during which he was suspended, citing case authority of the former Court of Claims for the proposi-

tion that an unlawful administrative action depriving an individual of a procedural right voids the action and leaves the employee on the rolls and entitled to his pay otherwise due until proper procedural steps are taken toward disciplining him (Pet. App. 7a). Although the court noted that because the agency delayed beyond a short and reasonable period of time to apprise the respondent of his regulatory rights to a hearing on his discharge, the agency no longer had the opportunity to correct any procedural error retroactively, it declined to extend this reasoning to the period after the agency abolished his former position but during which respondent's removal was still in effect, relying instead on another Court of Claims case involving an indefinite employee who was held, after a grievance hearing, to have had no retention rights beyond the life of his former division by regulation. The court of appeals thus ruled that, while the respondent was entitled to back pay for the period of his constructive suspension, he was not entitled to back pay for the period of his constructive removal (Pet. App. 6a-8a).

On May 14, 1986, the Federal Circuit denied the government's petition for rehearing and issued a second opinion reaffirming its original decision as not contrary to precedent of this Court or that of any court of appeals (Pet. App. 11a). The court noted that the basis for the Tucker Act suit here is the Back Pay Act, which "does authorize retroactive recovery of wages whenever a federal employee has 'undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of' the compensation to which the employee is otherwise entitled. 5 U.S.C. 5596(b)." *United States* v. *Testan*, 424 U.S. 392, 405 (1976) (Pet. App. 13a). In this connection, the court found that the respondent "clearly had the right to file his grievance

before he was removed" (Pet. App. 12a). The court rejected the government's contention that recognizing that a Tucker Act remedy is still available to individuals in respondent's situation who are not covered by the CSRA would in any way frustrate the statutory purpose of the CSRA, would undermine the congressional preference for an administrative remedy, and would disrupt administration of the congressional scheme, declaring: "Those dangers might exist if the result of this case were to allow parallel proceedings to progress at the same time, *i.e.*, if there were an alternative route for those covered by the CSRA. But that is *not* the result. Indeed, barring judicial review here on the government's theory would mean there is "'no forum' in which [the agency's] actions could or would be challenged" [*Block* v. *Community Nutrition Institute*, 467 U.S. 340, 352 (1984)]" (Pet. App. 15a-16a). The court further noted that neither *Community Nutrition* nor *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982), "supports the proposition that omission of any mention of an issue in one statute [CSRA] operates to repeal the grant of judicial review of that issue contained in a different statute [Tucker Act]" (Pet. App. 17a). The court concluded that for three decades it has been the well settled law "that an employing agency must comply with a regulation which it considered important enough to promulgate in the first place," citing *Watson* v. *United States*, 142 Ct.Cl. 749, 756 (1958). "In the Tucker Act and the Back Pay Act, Congress provided a remedy for a federal employee whose agency admittedly did not comply with its own regulation in removing him. For an employee in such a circumstance . . . the CSRA did not eliminate the previously existing remedy. The court is not free to dismantle what Congress has so carefully constructed" (Pet. App. 22a-23a).

On January 12, 1987, the Court granted the government's petition for a writ of certiorari, which raised only the question of whether respondent could obtain judicial review of an adverse personnel action under the Tucker Act, but did not challenge the court of appeals' conclusion that, under the facts of this case, the agency did not correctly resolve the merits of respondent's claims under the Tucker Act and Back Pay Act (Br. U.S. 6, n.6). On March 2, 1987, the Court granted the respondent's motion to file a brief pro se.

SUMMARY OF ARGUMENT

A. In *Lindahl* v. *OPM*, 470 U.S. 768 (1985), the Court recognized the continuing vitality of the Tucker Act remedy after the enactment of the Civil Service Reform Act of 1978 (CSRA) and the Federal Courts Improvement Act of 1982 (FCIA). Applying the *Lindahl* Court's observations to this case leads to the conclusion that the CSRA did not eliminate the Tucker Act remedy, as the government contends. The government fails to overcome the cardinal rule that repeals by implication are disfavored, and offers no contention that the agency regulations at issue here conflict with the CSRA. In light of the fact that a probationary employee was allowed to obtain judicial review of her discharge in violation of an agency regulation (*Watson* v. *United States*, 142 Ct.Cl. 749 (1958)) prior to the CSRA, and that the CSRA did not change the fact that excepted service employees like respondent are entitled to those rights which may be provided by agency regulations, it necessarily follows that respondent may likewise obtain judicial review of the correction of his wrongful discharge from employment.

B. The Back Pay Act provides that a wrongfully discharged employee is to be compensated for the entire

period during which the adverse personnel action was in effect, and for all purposes is deemed to have performed service for the agency during that period. As originally enacted in 1948, the Act established the basic principle that a wrongfully discharged employee is entitled to be made whole. The Act was broadened in 1966 to include within its coverage excepted service employees like respondent. In 1972, the Tucker Act was amended to enable the Court of Claims to order reinstatement of wrongfully discharged employees. The Back Pay Act was later amended as part of the enactment of the CSRA, wherein Congress expressed its intent that a wrongfully discharged employee be reinstated to the same or similar position or promoted, as appropriate, to make the employee whole. Subsequently, the agency promulgated regulations to establish an administrative grievance system, which formed the basis for the decision at issue in this case. The Back Pay Act covers a wider range of employees than does the CSRA, and regulations implementing the former Act provide that a court is an appropriate authority to order relief under the Act. It therefore follows that the Tucker Act and the Back Pay Act provide the appropriate remedy in the case at bar.

C. In *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), the Court held that an individual in circumstances nearly identical to those of respondent was entitled to reinstatement, subject to future separation action which could not be given retroactive effect. In other cases, and under different statutes, the Court has ordered appropriate relief to put the individual in the same position he would have been in had he not been subjected to wrongful action. At bottom, judicial review serves the purposes of enforcing agency compliance with Acts of Congress and duly promulgated regulations, and such judicial review should not be denied to respondent.

ARGUMENT

A FEDERAL EMPLOYEE WHO HAS BEEN WRONGFULLY DISCHARGED, BUT NOT RESTORED, MAY OBTAIN JUDICIAL REVIEW OF AGENCY COMPLIANCE WITH THE BACK PAY ACT IN THE CLAIMS COURT PURSUANT TO ITS HISTORIC TUCKER ACT JURISDICTION

A. The CSRA Did Not Eliminate the Tucker Act/Back Pay Act Remedy For Employees Not Covered By The CSRA

In *Lindahl* v. *OPM*, 470 U.S. 768 (1985), the Court recognized that the enactment of neither the Civil Service Reform Act of 1978 (CSRA) nor the Federal Courts Improvement Act of 1982 (FCIA) operated to alter the historic Tucker Act jurisdiction of the Claims Court with respect to claims brought by federal employees. First, it was noted that, in the CSRA, Congress provided that jurisdiction over a final order of the U.S. Merit Systems Protection Board (Board) would be either in a regional court of appeals or "in the Court of Claims, pursuant to the Tucker Act." *Lindahl* v. *OPM*, 470 U.S., at 794. Second, the Court observed that the FCIA created the Claims Court, which "would continue to exercise general Tucker Act jurisdiction," inheriting the authority of the former Court of Claims to "'issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records' [28 U.S.C. 1491(a)(2)(1982)]." *Lindahl* v. *OPM*, 470 U.S., at 796. Most significantly, the Court discovered in the House Report on the FCIA a reference to "civilian pay disputes . . . remaining as part of the Claims Court's jurisdiction [H.R. Rep. No. 97-312, 97th Cong., 1st Sess. 24 (1981)]." *Id.* The implications of this holding are clear: (1) the Tucker Act was not repealed by the enactment of the CSRA, but was retained by Congress as an integral part of the statutory scheme, and (2) the Tucker Act/Back Pay Act remedy which was available to employees who

could not appeal their discharges to the former Civil Service Commission (CSC) prior to the CSRA remains available to employees like respondent who may not appeal their discharges to the Board pursuant to the CSRA. Although addressing contract disputes in pertinent part, the House Report on the FCIA noted that "[t]he new Claims Court [would] be able to exercise equitable relief power" which would permit the court "to enjoin [government action] if, for example, illegal government conduct is involved." H.R. Rep. No. 97-312, at 25. In this vein, Congress stated that "the government must respect the rule of law. If it deviates from that norm it must be accountable for its actions in the courts, which are equipped with certain powers to redress proven wrongs." H.R. Rep. No. 97-312, at 43. It is in this context that the government's assertion that the respondent may not obtain judicial review under the Tucker Act, while at the same time admitting that the agency "did not correctly resolve the merits of respondent's claim" (Br. U.S. 6, n.6), attributes to Congress an irrationality and arbitrariness this Court should and ought not to share.

Applying the *Lindahl* Court's observations to the facts here leads directly to the conclusion that, because respondent invokes a right grounded in a regulation of an executive department (Br. U.S. 3, n.2), and a money-mandating pay statute (5 U.S.C. 5596 (1982)) exists for individuals like respondent, respondent's claim falls within the terms of the Tucker Act.

Had Congress intended to bar nonpreference eligible excepted service employees like respondent from judicial review of adverse personnel actions under the Tucker Act, there would presumably be some indication in the legislative history to this effect. There is none. Nor is

there any suggestion that Congress contemplated repealing the Tucker Act/Back Pay Act remedy.

Although the government encounters head-on the cardinal rule that repeals of Acts of Congress by implication are not favored by the courts, it reads congressional silence as effectuating a repeal by implication. The Court has recognized that, in the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945). Clearly, such is not the case here, where the Tucker Act/Back Pay Act remedy, under which a wrongfully discharged federal employee not specified as being within the jurisdictional parameters of the CSRA may obtain judicial review, can readily co-exist with the CSRA, under which those specified in the statute may obtain judicial review. It is evident that Congress viewed the CSRA as not having repealed the Tucker Act, but as "auxilliary to and in aid of the purposes of the old law." *Wood* v. *United States*, 16 Pet. (41 U.S.) 342, 363 (1842).

On its face, the agency regulation at issue here (Br. U.S. 3, n.2) does not conflict in any way with the provisions of Chapter 75 of the CSRA, which provides that employees in the competitive service and preference eligibles may appeal adverse personnel actions to the Board. The government cites nothing in the legislative history of the CSRA which prevents agencies from providing administrative grievance rights to individuals like respondent who are not covered by the CSRA. On the contrary, the petition for a writ of certiorari notes that agencies may establish such grievance systems and that employees in the excepted service like respondent are not excluded from such systems (Pet. 10, n.13). The government puts forward no contention that such agency regulations cannot readily co-exist with the statutory appeal rights provided to other employees by Chapter 75 of the CSRA. Indeed, the agency regulation at issue and Chapter 75 are not alternative remedies for the same class of employees, but specify that individuals covered by the one are barred from pursuing the other.

It would be anomalous to attribute to Congress an intent to put wrongfully discharged federal employees who may not appeal adverse personnel actions to the Board under the CSRA in a worse position than they were in prior to the enactment of the CSRA. Illustrating this is the second decision of the former Court of Claims in the case of *Watson* v. *United States*, 142 Ct.Cl. 749, 162 F.Supp. 755 (1958), which involved the claim of a probationary employee that she had been discharged in violation of agency regulations. After Watson's first appeal to the Court of Claims was rejected, *Watson* v. *United States*, 137 C.Cls. 557 (1956), this Court remanded for reconsideration (355 U.S. 14 (1957)) in light of *Service* v. *Dulles*, 354 U.S. 363 (1957), thereafter establishing the precedent that agency dismissal regulations have the force and effect of law. Since probationer Watson, who had no right to appeal her discharge to the former CSC, was permitted to obtain judicial review of her discharge in violation of agency dismissal regulations in the former Court of Claims under the Tucker Act, and since the only reference in the legislative history of the CSRA to the rights of similarly situated individuals was that they "are entitled to . . . those rights which may be provided by agency regulations" (*Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings on S. 2640, S. 2707, and S. 2830 Before the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 99-100 (1978))

(statement of Alan K. Campbell) (Br. U.S. 20, n.16), it necessarily follows that the respondent is entitled to the same remedy and may obtain judicial review of his wrongful discharge in the Claims Court under the Tucker Act.

B. In The Tucker Act And Back Pay Act, Congress Specifically Provided The Appropriate Remedy In This Case

The Back Pay Act, 5 U.S.C. 5596(b)(1) (1982), provides, in pertinent part, that "[a]n employee of an agency who, on the basis of a timely appeal or an administrative determination (including . . . a grievance) is found by appropriate authority under applicable law, rule, [or] regulation . . . to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal . . . of all . . . of the pay [and] allowances . . . of the employee (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect (i) an amount equal to all . . . of the pay [and] allowances . . . which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period . . . and (B) for all purposes, is deemed to have performed service for the agency during that period. . ."

As originally enacted, the Back Pay Act of 1948, Pub. L. No. 623, 62 Stat. 354, provided that an employee found to have been wrongfully removed "shall be paid compensation . . . for the period for which he received no compensation with respect to the position from which he was removed." Although the statutory language of the Act no longer conditions back pay on the status of a wrongfully discharged employee's former position, the basic principle of back pay established by Congress nearly four decades ago remains unchanged: "[A]n employee is entitled to be

made whole whenever an erroneous personnel action which has terminated or reduced his compensation is corrected by appropriate authority." S.Rep. No. 1062, 89th Cong., 2d Sess. 2 (1966).

Congress amended the Back Pay Act in 1966 with the specific intent of placing a wrongfully discharged employee "in the same position he would have been in had the unjustified or erroneous personnel action not taken place." S.Rep. No. 1062, at 1. At that time, the Act was broadened to include "each civilian officer or employee of an agency . . . whether in the competitive civil service [or] in the excepted service." H.R. Rep. No. 32, 89th Cong., 1st Sess. 3 (1965). Furthermore, the scope of the relief provided by the Act was intended, "in effect, that for all purposes the officer or employee shall be held and considered to have rendered service during the period of the unjustified or unwarranted personnel action . . . . This result is consistent with the current Government administration of those matters following a court . . . restoration order." H.R. Rep. No. 32, at 6. Indeed, the House Report declared that an award under the Act "represent[s] pay and employment benefits which have been unjustly taken away from an employee and which equity requires be paid back to him as a part of the corrective action taken to make him whole financially." H.R. Rep. No. 32, at 7.

In 1972, the Tucker Act was amended substantially for the first time since its original enactment in 1887 by Public Law 92-415, 86 Stat. 652, to expand the authority of the former Court of Claims to permit it not only to render money judgments to employees who are wrongfully discharged, but also the equity jurisdiction to direct their reinstatement. The Senate Report on the amendment specifically noted that "[t]he primary class of cases

where a broader remedy is needed are suits filed on a money claim by a Government employee who alleges that he was illegally discharged," particularly when there were "cases where administrative agencies refused to reinstate a wrongfully discharged employee." S.Rep. No. 92-1066, 92d Cong., 2d Sess. 2 (1972).

Section 702 of the CSRA amended the Back Pay Act of 1966, *inter alia*, to provide "that a make-whole remedy may include reinstatement to the same position that the employee was in before the unjustified or unwarranted action was taken or for restoration to a substantially similar position. It also provides for directing a promotion to a higher level position when such an order would effectuate the make-whole purposes of the Act." The legislative history re-emphasized "that for all purposes an employee is deemed to have performed service for the agency during the period of the unjustified or unwarranted action." S.Rep No. 95-969, 95th Cong., 2d Sess. 115 (1978).

In its petition for a writ of certiorari, the government noted that the U.S. Office of Personnel Management (OPM) requires agencies to establish administrative grievance systems in which an employee may raise "any matter of concern or dissatisfaction relating to the employment of an employee which is subject to the control of agency management" (5 C.F.R. 771.205), and that employees in the excepted service (such as respondent) are not excluded from coverage of such appeal systems (5 C.F.R. 771.206(b)) (Pet. 10, n.13). Subsequent to the publication of the final regulations in 5 C.F.R. Part 771, OPM advised the agencies that they were authorized to "extend coverage to any aspect of a separation action that is not appealable to the [Board] . . . . Illustrations of separations which may be covered are separation of a

probationer for misconduct, termination of temporary employment, and separation of nonveterans in the excepted service [such as respondent]." 771 Fed. Pers. Man. 9 (1981).

The agency thereafter promulgated regulations to implement an administrative grievance system in compliance with 5 C.F.R. Part 771. Entitled "Employee Grievances," and designated as Chapter 771 of its Departmental Manual (DM), the regulations covered all current employees (Br. App. 2), and provided that matters not covered included decisions "appealable to the Merit Systems Protection Board" (Br. App. 4) and investigations conducted by the "Special Counsel" (Br. App. 5). Most significantly, the agency regulations provided that "[w]hen separated for cause, including performance deficiencies, a nonpreference 'career-type' employee in the excepted service who has completed one year of current continuous service in the same or similar positions. . . is accorded a right to a formal hearing conducted by a grievance examiner" (Br. U.S. 3, n.2).

Although the government has not challenged the validity of the agency regulations at issue, and does not contend that the regulations did not apply to the respondent, it argues that, since only "employees" as defined in 5 U.S.C. 7511(a) (1982) are protected by the CSRA, and since only such individuals may appeal adverse personnel actions to the Board and then may obtain judicial review in the Federal Circuit, it must follow that respondent, who is not an "employee" within the meaning of the CSRA, may not obtain judicial review in any forum. What the government necessarily overlooks is that the Back Pay Act, pursuant to which respondent's wrongful discharge was administratively cancelled by the agency (Br. App. 49) covers a wider range of employees than the

CSRA. See H.R. Rep. No. 32, at 3. And, while there has apparently never been a specific judicial review provision for agency administrative grievances, regulations implementing the Back Pay Act provide that an award of compensation may be made only after an "administrative determination," which includes an agency administrative grievance, and that "a court" is an "appropriate authority" under the Act "to correct or direct the correction of an unjustified or unwarranted personnel action." 5. C.F.R. 550.803 (1982).

In *Sampson* v. *Murray*, 415 U.S. 61, 91 (1974), the Court observed that the legislative history of the Back Pay Act "suggests that Congress contemplated that it would be the usual, if not the exclusive, remedy for wrongful discharge" in which case "whatever damage [that] might occur would be fully corrected by an administrative determination requiring the agency to fully conform to the applicable regulations." As the government has essentially admitted (Br. U.S. 6, n.6) that the administrative determination failed to require the agency to fully conform to applicable regulations, and in light of the fact that the respondent was not made whole for having been subjected to an unwarranted or unjustified personnel action, to wit, discharge without the hearing required by agency regulations, the only "meaningful remed[y] against the United States" (*Bush* v. *Lucas*, 462 U.S. 367, 368 (1983)) available to respondent in this case is the Tucker Act/Back Pay Act remedy.

"Courts of Equity delight to do justice, and not by halves." Story, *Equity Pleading*, Sec. 72 (1844). The Court is thus urged not to fractionalize the relief already accomplished at the administrative level in this case. Affirmance would allow the Claims Court to "complete

the relief afforded by the judgment" (28 U.S.C. 1491(a)(2) (1982).

C. Equity Requires That Wrongfully Discharged Employees Be Made Whole

The authority of the Court's decision in *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), provides ample justification for affirmance. There, an employee of the Department of the Interior (the "agency" in this case), whose employment rights were not protected by the Civil Service Act or any other federal statute, filed an action in the District Court for a declaration that his dismissal had been illegal and for an injunction requiring his reinstatement. The District Court held for the government, and its action was affirmed by the court of appeals. This Court reversed.

The Court noted that the petitioner, as a "Schedule A" employee (as was respondent here), could have been summarily discharged by the Secretary at any time without the giving of a reason, as urged by the government. This Court found, however, that the Secretary was also obligated to conform to the procedural safeguards he had formulated in department regulations for the dismissal of employees on specific grounds, citing *Service* v. *Dulles*, 354 U.S. 363 (1957). As the department regulations were found on their face to apply to Schedule A employees, the Court ordered the petitioner reinstated, declaring: "[H]aving chosen to proceed against petitioner on security grounds, the Secretary here, as in *Service*, was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily." *Vitarelli* v. *Seaton*, 359 U.S., at 539-540.

Here, an examination of the record discloses that the respondent's procedural rights under the applicable reg-

ulations were violated in at least two material respects in order to accomplish his discharge and subsequently deny him reinstatement.

First, section 3.3B of the cited regulations defines "employees" covered, and states: "Former employees *must* file a timely grievance concerning a matter appropriate for review under these procedures *prior to separation* in order to receive consideration [emphasis added]" (Br. App. 2). Respondent was discharged effective January 16, 1981 (Br. App. 23); the above-cited procedure was made available to respondent on March 22, 1982 (Br. App. 52). The record does not indicate that the respondent was at any time restored to the rolls so that his grievance could be legally adjudicated by the agency, as required by section 3.3B. (See Pet. App. 12a for the lower court's discussion of the application of this section to respondent.)

Second, section 3.22A provides: "When separated for cause, . . . a nonpreference 'career-type' employee in the excepted service who has completed one year of current continuous service [equivalent to the probationary period in the competitive service] in the same or similar positions and whose position has been specifically included by the Bureau head or higher authority as covered under the procedures of 370 DM 752 [the agency's adverse action regulations], is accorded a *right to a formal hearing* conducted by a grievance examiner [emphasis added]" (Br. App. 48). The government has at no time denied that the respondent was covered by this section, however, the record in this case includes no transcript of any kind of hearing due to the fact that none was conducted, as specifically required by section 3.22A. (See Pet. App. 3a.)

It is submitted that the grievance procedure, as applied in this case, had no valid basis in law. Even if the agency

had conducted the regulatorily required hearing when it advised respondent of his rights, there was no legal jurisdiction over respondent so long as he remained a former employee (Br. App. 53) who filed his grievance *after* he was separated. The government's argument that "respondent received all the back pay to which he was entitled" (Br. U.S. 6, n.6) necessarily ignores the fact that, once the agency cancelled the respondent's discharge under the legal authority of the Back Pay Act, 5 U.S.C. 5596 (1982) (Br. App. 49), it was obligated by law to consider the respondent an employee "for all purposes" during the entire period for which the erroneous personnel action was in effect. In other words, the agency could not legally deprive the respondent of pay for any reason, whether by suspension or termination, during the period for which his wrongful discharge was in effect. Indeed, a similar argument by the government in *Vitarelli* that subsequent amendment of personnel records after an employee has been wrongfully discharged somehow cures the procedural defects of the original erroneous action and makes the employee whole was squarely rejected by the Court (359 U.S., at 545-546), and should be rejected here as well. There, the Court concluded: "It follows from what we have said that petitioner was entitled to the reinstatement which he seeks, subject, of course to any lawful exercise of the Secretary's authority *hereafter* to dismiss him from employment in the Department of the Interior [emphasis added]" (*Vitarelli* v. *Seaton*, 359 U.S., at 546). It is clear that whatever actions taken by the agency, which admittedly "did not correctly resolve the merits of respondent's claim" (Br. U.S. 6, n.6), may not legally be given retroactive effect.

In other contexts, and under different statutes, the Court has ordered status quo ante relief. The Court so

acted over one century ago in *Wicker* v. *Hoppock*, 6 Wall. (73 U.S.) 94, 99 (1867), when it declared:

> The general rule is that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.

Similarly, in *United States* v. *Perkins*, 116 U.S. 483, 485 (1886), the Court affirmed the judgment of the Court of Claims holding that a claimant, who was not legally discharged from office, "is still in office and is entitled to the pay attached to the same." In *United States* v. *Wickersham*, 201 U.S. 390, 399 (1906), the Court held that a wrongful suspension could not operate to deprive an employee of the benefits and emoluments of his position. Such employee, so long as he was ready and willing to perform his duties, could not be deprived of the compensation legally belonging to him (201 U.S., at 400). In *Phelps Dodge* v. *National Labor Relations Board*, 313 U.S. 177, 194 (1941), the Court noted that the basic purpose of a reinstatement order is "restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal" personnel action, and that the function of a back pay award is "to make [employees] whole for the loss of pay" (313 U.S., at 182). More recently, in *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983), the Court held that Congress intended that remedies authorized by the Back Pay Act, 5 U.S.C. 5596 (1982), would put the employee "in the same position he would have been in had the unjustified or erroneous personnel action not taken place."

In the final analysis, both Congress and this Court have recognized the values served by judicial review for the

purpose of enforcing agency compliance with Acts of Congress and duly promulgated regulations. The thrust of the government's argument here would be to deny respondent judicial review of his right to relief under the Back Pay Act, even if the agency admitted violating its regulations and then refused to award him any back pay at all. As previously demonstrated, a "court" is an "appropriate authority" to order an award of compensation under the Back Pay Act, and the regulations implementing the Act (5 C.F.R. Part 550) have not been challenged. The precise point is that respondent was discharged without any kind of hearing, in violation of agency regulations, and then refused full reinstatement on correction of the action. To accord an employee such a crucial and substantive right as a hearing but deny him the means to enforce it is like "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards* v. *California*, 314 U.S. 168, 186 (1941) (Jackson, J. concurring).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JOSEPH ANTHONY FAUSTO
1111 Arlington Boulevard
W-310
Arlington, Virginia 22209
(703) 528-2746
Appearing pro se

REPLY

BRIEF

Supreme Court, U.S.
FILED
SEP 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-595

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH A. FAUSTO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Cases:	Page
Batchelor v. *United States*, 169 Ct. Cl. 180, cert. denied, 382 U.S. 870 (1965)	11-12
Block v. *Community Nutrition Institute*, 467 U.S. 340 (1984)	5-6
Bowen v. *Michigan Academy of Family Physicians*, 476 U.S. 567 (1986)	5, 15
Brown v. *GSA*, 425 U.S. 820 (1976)	15
Bush v. Lucas, 462 U.S. 367 (1983)	3
Carducci v. *Regan*, 714 F.2d 171 (D.C. Cir. 1983)	6, 16
Chu v. *United States*, 773 F.2d 1226 (Fed. Cir. 1985)	2
Cook County Nat'l Bank v. *United States*, 107 U.S. 445 (1882)	3, 15
Fiorentino v. *United States*, 607 F.2d 963 (Ct. Cl. 1979), cert. denied, 444 U.S. 1083 (1980)	11
Greenway v. *United States*, 163 Ct. Cl. 72 (1963)	1
Harrison v. *Bowen*, 815 F.2d 1505 (D.C. Cir. 1987)	2, 6, 9, 11, 15
McClary v. *United States*, 775 F.2d 280 (Fed. Cir. 1985)	6, 15
Morton v. *Mancari*, 417 U.S. 535 (1974)	5
Rosano v. *United States*, 800 F.2d 1126 (Fed. Cir. 1986), aff'g 9 Cl. Ct. 137 (1985), cert. denied, No. 86-1169 (Mar. 2, 1987)	6
Service v. *Dulles*, 354 U.S. 363 (1957)	9
Spagnola v. *Mathis*, 809 F.2d 16 (D.C. Cir. 1986)	6, 15
United States v. *Connolly*, 716 F.2d 882 (Fed. Cir. 1983), cert. denied, 465 U.S. 1065 (1984)	9
United States v. *Testan*, 424 U.S. 392 (1976)	4
United Steelworkers v. *Enterprise Wheel Corp.*, 363 U.S. 593 (1960)	14
Veit v. *Heckler*, 746 F.2d 508 (9th Cir. 1984)	7
Vitarelli v. *Seaton*, 359 U.S. 535 (1959)	9

Statutes and regulations:	Page
Administrative Procedure Act, 5 U.S.C. (& Supp. III) 701 *et seq.*	6
Back Pay Act of 1966, 5 U.S.C. 5596(b)(1)	4

Statutes and regulations—Continued: Page

Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 ---- 2

Ch. 21, 5 U.S.C. 2101 *et seq.*:

5 U.S.C. 2103(a) ---- 10

Ch. 23, 5 U.S.C. 2301 *et seq.*: ---- 6

5 U.S.C. 2302 ---- 2

Ch. 43, 5 U.S.C. (& Supp. III) 4301 *et seq.* ---- 6, 9, 10

5 U.S.C. 4301(2) ---- 8

5 U.S.C. 4303(b) ---- 9, 10

5 U.S.C. 4303(e) ---- 8, 9, 11

5 U.S.C. 4303(f) ---- 10

Ch. 75, 5 U.S.C. 7501 *et seq.*: ---- 2, 6, 7, 8, 11

5 U.S.C. 7511(a)(1)(A) ---- 10, 11

5 U.S.C. 7511(c) ---- 2, 6, 7

Ch. 77, 5 U.S.C. 7701 *et seq.*:

5 U.S.C. 7702 ---- 2, 3

5 U.S.C. 7703 ---- 2

Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e *et seq.* ---- 5

Indian Reorganization Act of 1934, 25 U.S.C. 472 ---- 5

Mandamus Act, 28 U.S.C. 1361 ---- 14-15

Tucker Act, 28 U.S.C. 1491 ---- 4

42 U.S.C. 1985(1) ---- 6

5 C.F.R.:

Section 213.3102 ---- 13

Section 213.3102(hh) (1978) ---- 13

Section 213.3301 ---- 13

Section 752.401(b)(3) ---- 13

Section 752.401(b)(4) ---- 13

Miscellaneous:

Department of the Interior Federal Personnel Manual—231 (May 4, 1981) ---- 14

S. Rep. 95-969, 95th Cong., 2d Sess. (1978) ---- 4, 10

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-595

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH A. FAUSTO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The amicus appointed by this Court to defend the decision of the court of appeals (hereinafter referred to as "the amicus") argues (Br. 16-19) that since the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (CSRA), did not expressly negate the right of excepted service employees like respondent to obtain judicial review of adverse actions under *Greenway* v. *United States*, 163 Ct. Cl. 72 (1963), that right must be deemed to have survived the enactment of the CSRA. But the amicus does not adequately answer our argument that the CSRA deals comprehensively and advertently with the remedies available to excepted service employees and does so in a manner inconsistent with allowing such

a remedy. Nor does the amicus succeed in distinguishing (Br. 24-28) the many cases in which the courts of appeals (other than the court below) have unanimously concluded that the CSRA does, in comparable situations, implicitly preclude review that would have been allowed by pre-CSRA cases.

Respondent is an excepted service employee. No one disputes that "it is well established that an employing agency is free to discharge excepted service employees without cause" (*Chu* v. *United States*, 773 F.2d 1226, 1228 n.2 (Fed. Cir. 1985)). It is also undisputed that excepted service employees discharged for inadequate job performance (under Chapter 43) have no right to judicial review (*Harrison* v. *Bowen*, 815 F.2d 1505 (D.C. Cir. 1987)). The question here is whether an excepted service employee who was suspended for 30 days for misconduct (an adverse action of the sort governed by Chapter 75) may obtain judicial review. The statute explicitly gives such an employee (i) judicial remedies if he alleges that his suspension resulted from discrimination (see 5 U.S.C. 7702, 7703; U.S. Br. 17 n.11); (ii) the right to complain to the Special Counsel of the Merit Systems Protection Board (MSPB) if he alleges that his suspension resulted from a "prohibited personnel practice" (see 5 U.S.C. 2302; U.S. Br. 21); and (iii) the full range of Chapter 75 remedies if he falls (respondent does not) within any category of excepted service employees to which the Office of Personnel Management (OPM) has exercised its statutory discretion to grant such rights (see 5 U.S.C. 7511(c) (Pet. App. 36a)); except in these cases, excepted service employees have no right to judicial review of adverse actions of the sort covered by Chapter 75.

1. As the amicus recognizes (Br. 17; see also American Federation of Government Employees (AFGE) Br. 10-11), Congress may intend a remedial scheme to preclude other remedies even if it does not say so expressly; where it is clear despite the absence of an exclusivity clause that Congress intended to preclude review under other statutes, that intent must be given effect. As this Court said a century ago, "[a] law embracing an entire subject, dealing with it in all its phases, may thus withdraw the subject from the operation of a general law as effectually as though, as to such subject, the general law were in terms repealed." *Cook County Nat'l Bank* v. *United States*, 107 U.S. 445, 451 (1882). The CSRA deals comprehensively with remedies for adverse actions. As we explained in our opening brief (at 13-22), Congress dealt advertently with excepted service employees in that statute and deliberately decided to grant them certain remedies and not others. This "elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations" (*Bush* v. *Lucas*, 462 U.S. 367, 388 (1983)) shows that Congress did not intend that excepted service employees should have additional rights with respect to adverse actions under other statutes.[1]

---

[1] As we noted in our opening brief (at 17 n.11), where Congress *did* want to preserve non-CSRA judicial remedies for certain kinds of claims, such as discrimination claims, it did so explicitly, and it carefully integrated the procedures for bringing such claims with CSRA procedures (see 5 U.S.C. 7702, 7703). If Congress had intended to permit excepted service employees to challenge adverse actions in court under *Greenway* it could have said so and established procedures and standards to govern such challenges, as it did for discrimination claims.

The decision below was premised on *Greenway*, in which the Court of Claims held in 1963 that a "suit for back pay alleging a violation of [agency] regulations was cognizable in the Court of Claims" (Pet. App. 3a).[2] The amicus stresses (Br. 17) the canon that "repeals by implication are disfavored." But apart from the fact that "disfavored" expresses only a preference, no statute was repealed here. The Tucker Act, 28 U.S.C. 1491, is "merely jurisdictional" (*United States* v. *Testan*, 424 U.S. 392, 400 (1976)) and grants no rights to federal employees. The Back Pay Act of 1966 by its terms awards back pay only *after* there has been a finding "by appropriate authority under applicable law * * * [that the employee was] affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of [his] pay" (5 U.S.C. 5596(b)(1)); it plainly does not itself *give* the employee any right he did not otherwise have to obtain judicial review of the correctness of a personnel action.[3] The issue here is merely whether

[2] The amicus contends (Br. 17), as does the AFGE (Br. 15), that it must be assumed that Congress was aware that the Court of Claims had held in *Greenway* that a probationary, excepted service employee had a right to review in the Court of Claims. There is no evidence for such an assumption; the relevant congressional reports note only that prior to the enactment of the CSRA competitive service employees challenging adverse actions "generally file[d] their claims with U.S. District Courts." S. Rep. 95-969, 95th Cong., 2d Sess. 63 (1978).

[3] Here, the Department of the Interior complied fully with the Back Pay Act: having found that the personnel action was unjustified to the extent it exceeded a 30-day suspension, the Department awarded respondent more than seven months back pay. This case does *not* present the question whether an employee may bring suit to enforce his right to back pay in respect of a personnel action that *has been determined* to have been unjustified or unwarranted.

the decision in *Greenway*, which pieced together an implied cause of action from those two statutes (see Pet. App. 13a), survives enactment of the CSRA.[4]

Nor is the canon of construction that agency actions taken pursuant to regulations are generally reviewable, on which the amicus also relies (Br. 18-19), dispositive. This Court recently stated that "[t]he presumption of judicial review is after all, a presumption, and 'like all presumptions used in interpreting statutes, may be overcome by,' *inter alia*, * * * a specific congressional intent to preclude judicial review that is '"fairly discernible" in the detail of the legislative scheme.'" *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 567, 673 (1986) (quoting *Block* v. *Community Nutrition In-*

[4] This case thus differs from *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974), relied upon by the court below (Pet. App. 4a) and by respondent (Br. 7), where this Court rejected the claim that the employment preference for Indians established by the Indian Reorganization Act of 1934, 25 U.S.C. 472, was implicitly invalidated by the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e *et seq.*, which prohibits race discrimination in federal employment. The argument in that case was that the 1972 Act negated the Indian preference statute itself. (The Court noted in that case that the Indian preference statute "is a specific provision" whereas the 1972 Act "is of general application," and concluded that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment" (417 U.S. at 550-551). In this case, in contrast, the issue is whether a specific statute (the CSRA) forecloses a right of action that had previously been judicially implied.)

stitute, 467 U.S. 340, 349, 351 (1984)). Such a specific intent is plainly discernible in the CSRA.[5]

2. In three earlier cases, *Spagnola* v. *Mathis*, 809 F.2d 16, 30 (D.C. Cir. 1986) (federal employee who was not promoted may not bring claim under 42 U.S.C. 1985(1)), *Rosano* v. *United States*, 800 F.2d 1126 (Fed. Cir. 1986) (per curiam), aff'g 9 Cl. Ct. 137, 142 (1985) (probationary employee may not obtain review of dismissal under the Tucker Act), cert. denied, No. 86-1169 (Mar. 2, 1987), and *Carducci* v. *Regan*, 714 F.2d 171, 173-175 (D.C. Cir. 1983) (employee subjected to a brief suspension may not obtain review under the Administrative Procedure Act, 5 U.S.C. (& Supp. III) 701 *et seq.*), courts of appeals have held that the CSRA implicitly foreclosed rights of judicial review that had previously been recognized under more general statutes, even though that left the employee without a judicial remedy. See also *Harrison* v. *Bowen*, 815 F.2d 1505 (D.C. Cir. 1987) (excepted service employee may not obtain review of dismissal under the CSRA or the APA); *McClary* v. *United States*, 775 F.2d 280 (Fed. Cir. 1985) (demoted competitive service employee may not bring Tucker Act claim). Indeed, every other

[5] As we have argued (U.S. Br. 27-36), the *Greenway* remedy conflicts with Congress's intent in enacting the CSRA, made evident by its advertent treatment of excepted service employees in Chapters 23, 43, and 75 of the CSRA, that those employees have only limited rights in adverse action cases (such as the right to complain to the Office of Special Counsel of the MSPB and certain procedural rights in cases brought under Chapter 43), not including any right to obtain judicial review unless they are preference eligibles or part of a class of excepted service employees to which the Office of Personnel Management has extended the rights available under Chapter 75 pursuant to 5 U.S.C. 7511(c) (Pet. App. 36a).

court of appeals that has considered the matter has concluded that "the comprehensive nature of the procedures and remedies provided by the CSRA indicates a clear congressional intent to permit federal court review as provided in the CSRA or not at all." *Veit* v. *Heckler*, 746 F.2d 508, 511 (9th Cir. 1984). That proposition is dispositive here.

Like the court below, the amicus does not dispute the many other decisions holding that the comprehensive nature of the CSRA's treatment of adverse actions precludes review under more general statutes; instead, he seeks unsuccessfully to distinguish them. As did the court below, the amicus attempts (Br. 25-26) to distinguish *Carducci* on the ground that the employee who sought review in that case was "covered by the provisions of Chapter 75" whereas respondent allegedly is not. But both the employee in *Carducci* and respondent are within Chapter 75's "universe of discourse," and in both cases the question is whether the deliberate decision not to provide for review in that Chapter implies a congressional intention that it not be available. The employee in *Carducci* had no right of action under Chapter 75 because the action taken against him was a "minor" adverse action. The court in *Carducci* held that Congress's decision not to provide a Chapter 75 remedy for minor adverse actions implicitly precluded review under the APA as well. Respondent is not an "employee" for purposes of enjoying Chapter 75 remedies; however (see U.S. Br. 19), this is not because Congress forgot him, but because Congress expressly excluded excepted service employees and gave OPM the discretion to extend the rights granted in Chapter 75 to excepted service employees if it deemed that appropriate (5 U.S.C. 7511(c)

(Pet. App. 36a)). It makes no sense to reach a different result here than in *Carducci* because Congress, by including the plaintiff in *Carducci* within the definition of "employee" in Chapter 75, granted that employee *some* procedural rights, while, by defining "employee" so as not to include excepted service personnel for purposes of that Chapter, Congress granted them *no* rights. As we argued in our opening brief (at 19), Congress dealt advertently with excepted service employees in Chapter 75, and (see U.S. Br. 31-32) it would invert logic to conclude that, because Congress gave excepted service employees fewer rights than another group under the CSRA, it intended them to have greater rights otherwise.

The amicus attempts to distinguish *Harrison* (Br. 26 n.11) in similar fashion. The amicus notes that the excepted service employee in that case sought review of an adverse action taken under Chapter 43 of the CSRA, which governs adverse actions taken on the basis of inadequate job performance as measured by ratings of performance on the critical elements of employees' jobs. Excepted service employees are included in the definition of "employee" in Chapter 43 (5 U.S.C. 4301(2) (Pet. App. 31a-32a)) but, unlike competitive service employees and veterans, are not authorized to obtain judicial review of adverse actions taken under that Chapter (5 U.S.C. 4303(e) (Pet. App. 33a-34a)). Because the adverse action in this case is of the sort that is covered by Chapter 75 rather than Chapter 43, the amicus argues that, although the employee in *Harrison* was precluded from obtaining judicial review under other statutes by the comprehensive provisions of the CSRA, respondent is not. Once again, the amicus, like the court below, has it backwards. The fact that

Congress expressly granted excepted service employees greater rights under Chapter 43 (but not including a right to judicial review (see 5 U.S.C. 4303(b) and (e) (Pet. App. 32a-34a)) than under Chapter 75 is hardly a reason to conclude that they should be accorded greater rights in adverse action cases of the sort covered by Chapter 75 than in adverse action cases of the sort covered by Chapter 43.[6]

The amicus's argument totally flounders in trying to explain (Br. 27) why excepted service employees may obtain judicial review of adverse actions while, under *Rosano* (see also *United States* v. *Connolly*, 716 F.2d 882 (Fed. Cir. 1983) (en banc), cert. denied, 465 U.S. 1065 (1984)), probationary employees may not, even though *Greenway*, the decision that is the foundation for the right to review asserted here, held that a *probationary* excepted service employee could obtain review of an adverse action (see Pet. App. 3a-4a). The amicus first states (Br. 27) that the decisions holding that probationary employees may not obtain judicial review of adverse actions "were based upon the express exclusion of probationary employees from the definition of employees in Chapter 75," whereas, according to the amicus, excepted service employees are not expressly excluded from that definition. There is simply no basis for that argument. The relevant definitional section defines "employee" as "an individual in the competitive

---

[6] In addition, contrary to the argument of the amicus (Br. 18-19), the court in *Harrison* explained (815 F.2d at 1517) that the presumption that judicial review is normally available to determine whether an agency complied with its regulations, as this Court held in *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), and *Service* v. *Dulles*, 354 U.S. 363 (1957), is inapplicable where the relevant statutory scheme shows that Congress intended to preclude judicial review.

service who is not serving a probationary or trial period" (5 U.S.C. 7511(a)(1)(A) (Pet. App. 36a)). As the amicus states, probationary employees are excluded from the definition by the phrase "not serving a probationary or trial period." But excepted service employees are just as explicitly excluded from the definition by the phrase "in the competitive service" since excepted service personnel are those federal employees whose positions are excepted from the competitive service (5 U.S.C. 2103(a)). Since probationary employees and excepted service employees are excluded from the definition of "employee" by adjoining clauses in the same sentence of the applicable definitional provision, it is clear that the same conclusion must be drawn from both exclusions.

The amicus also tries to distinguish between excepted service employees and probationary employees (Br. 27) on the basis of the statement in the Senate Report that "[t]he probationary or trial period * * * is an extension of the examining process * * * [so that it] is inappropriate to restrict an agency's authority to separate an employee who does not *perform acceptably* during this period." S. Rep. 95-969, 95th Cong., 2d Sess. 45 (1978) (emphasis added). The amicus argues that this "clear indications in the legislative history that Congress did not intend judicial review for probationary employees" (Br. 27) distinguishes them from excepted service employees. But the purpose of the statement was to explain why probationary employees are not granted *any* procedural rights under *Chapter 43*, which deals with job performance (see 5 U.S.C. 4303(f)); excepted service employees have certain rights under that Chapter (see 5 U.S.C. 4303(b) (Pet. App. 32a-33a)), but they concededly do not include judicial review (see

5 U.S.C. 4303(e) (Pet. App. 33a-34a); *Harrison* v. *Bowen*, *supra*). The statement does not have any bearing at all on whether judicial review should be available to excepted service employees with respect to the kinds of adverse actions governed by Chapter 75.

The adverse action taken here is of a type governed by Chapter 75. Section 7511(a)(1)(A) (Pet. App. 36a) excludes excepted service employees just as explicitly as it excludes probationary employees from the procedural rights granted by that Chapter. Nothing distinguishes the degree of explicitness with which they are excluded except that Congress has provided that OPM may by regulation grant certain types of excepted service employees the rights provided in Chapter 75, a difference whose only relevance is that it further demonstrates that Congress dealt advertently with respect to the rights of excepted service personnel following adverse actions covered by Chapter 75.[7] Like the probationary employee in *Romano*, a decision that amicus does not challenge, respondent was implicitly denied judicial review of such actions by *Congress*, which deliberately excluded him from the coverage of Chapter 75.

Finally, it has long been understood that "[t]he consequences of one's being in the 'excepted' service (and not a veteran) are that one cannot put on the panoply of protection available to those in the 'competitive' service when threatened by adverse action for cause." *Fiorentino* v. *United States*, 607 F.2d 963, 966 (Ct. Cl. 1979), cert. denied, 444 U.S. 1083 (1980), citing *Batchelor* v. *United States*, 169

[7] OPM has provided that some excepted service personnel, but not respondent, have the rights granted "employees" in Chapter 75 (see 5 C.F.R. 752.401(b)(3) and (4)).

Ct. Cl. 180, cert. denied, 382 U.S. 870 (1965).[8] Accordingly, it would not seem to require any explanation that by granting certain rights to competitive service employees (and veterans) only, Congress did not intend non-veterans in the excepted service to share those rights.

3. Canons of statutory construction should not be allowed to displace common sense. Here, as in most instances where Congress expressly failed to provide judicial review or other elaborate remedy in the CSRA, the obvious explanation is that Congress thought the remedy impractical or unwarranted in the circumstances. In cases involving minor adverse actions, for example, Congress decided, as the court in *Carducci* concluded, that limited procedural protections, not including a right to judicial review, were all that the circumstances warranted. In cases involving probationary employees, Congress decided, as the court in *Rosano* concluded, that Congress intended, by not providing judicial review to probationary employees, to foreclose that right; a probationary period is a good deal less "probationary" if the employee may challenge a decision to discharge him in the courts.

It is equally obvious that the sensible explanation for the CSRA's grant of only limited remedies, not

[8] As noted in our opening brief (at 30 n.23), it seems clear that excepted service employees have no property interest in their jobs (and, in any event, respondent received any process due him). Only the brief on behalf of amici Finn et al. (at 11-12) challenges that conclusion. Contrary to amici Finn et al., the fact that it has long been understood that excepted service employees have extremely limited rights (and, therefore, no property interest in their jobs) shows that no serious constitutional question is raised by denying them judicial review of adverse actions.

including judicial review, to excepted service employees, is that Congress thought only limited remedies were appropriate to the nature of these positions. The excepted service contains various kinds of employees. Some, like respondent, are placed in the excepted service because they are hired for positions that will exist for only a short period, so that it is not practical to hold competitive examinations for those positions. See 5 C.F.R. 213.3102(hh) (1978); 5 C.F.R. 213.3102. It would make little sense to provide elaborate remedial provisions for such employees in the case of adverse actions, since their positions will exist for only a limited duration in any event. The same facts that make it impractical to hold competitive examinations to fill the positions obviously tend to make it impractical to conduct lengthy reviews of why a particular employee was subjected to an adverse action.[9]

As noted in our petition for a writ of certiorari (at 10 n.13), OPM requires agencies to establish grievance systems in which employees may raise employment matters, and excepted service employees

[9] Many excepted service employees serve in policy-making or confidential positions. See 5 C.F.R. 213.3301. It is generally understood that persons holding such positions should not have any sort of tenure, as their placement in the excepted service confirms, and that their employment is subject to the will of the "head of an agency or other key appointed official[]" with whom they have "a close and confidential working relationship" (*ibid.*). As noted above (see page 2), Congress expressly provided that OPM may extend to such excepted service positions as it deems appropriate the rights provided competitive service employees by Chapter 75. OPM has extended such rights to two categories of excepted service positions (5 C.F.R. 752.401(b)(3) and (4)), but respondent's position is not in either category.

are generally covered by those systems. Thus, as in this case, excepted service employees generally may file grievances challenging adverse actions.[10] Congress plainly concluded that for those positions no judicial remedy (which would enable excepted service employees to go directly to court while competitive service employees must pursue their CSRA administrative remedies) would be appropriate.

The AFGE repeatedly suggests (Br. 11-12, 16) that, knowing that judicial review is unavailable, agencies will fail to follow their grievance procedures. This is certainly not such a case. The Department of the Interior, upon realizing that respondent should have been permitted to file a grievance, allowed him to do so and granted him more than seven months back pay even though dismissal was a permissible sanction for his admitted infractions (see Pet. App. 24a-25a). Conversely, the court below did not merely determine whether the Department of the Interior had complied with the plain requirements of its regulations, but went beyond that to conclude that, since it had *belatedly* complied, the agency was required to cancel respondent's 30-day suspension despite the statutory requirement of such a suspension. The possibility, suggested in our opening brief (at 33 n.25), that there could be a case in which review under the Mandamus Act, 28 U.S.C.

[10] In analogous cases arising in the private sector, courts do not review the merits of grievance decisions where, as here (see *Department of the Interior Federal Personnel Manual—231*, Pt. 370 DM 771-3.21 (May 4, 1981)), the terms of the provision establishing the grievance procedure do not provide for such review. See *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

1361, is appropriate to correct an agency's clear failure to follow its regulations does not warrant the decision below, allowing excepted service employees routinely to challenge adverse actions in the Claims Court despite Congress' contrary intention.[11]

Finally, the amicus states (Br. 31) that, despite the fact that allowing respondent to bring suit seems plainly contrary to Congress's intent and leads to anomalous results, "[i]t does not fall to this Court to mend the holes in a congressional tapestry." The argument is, in essence, that it is beyond this Court's powers to determine, in the absence of an exclusivity provision, that Congress intended the remedies provided in the CSRA to be the exclusive remedies for adverse actions. There is absolutely no merit to that view. Reading the provisions of a general statute in light of the provisions of a specific statute to determine whether suit may be filed under the general statute is a quintessential judicial activity, as this Court has recognized at least from 1882 (see *Cook County Nat'l Bank* v. *United States*, *supra*) to the present (see *Bowen* v. *Michigan Academy of Family Physicians*, *supra*), and has specifically recognized in a case involving the rights of federal employees (*Brown* v. *GSA*, 425 U.S. 820 (1976)). All of the courts of appeals that have determined that federal employees may not pursue claims under general statutes (see *Harrison* v. *Bowen*, *Spagnola* v. *Mathis*, *Rosano* v. *United States*, *McClary* v. *United States*,

[11] In invoking *Greenway*, the court below described that case as providing a right to review to determine whether a dismissal was "arbitrary" (Pet. App. 3a-4a), thus implying that review of the merits of the decision was in order, not merely review of whether the agency had followed its own procedures.

and *Carducci* v. *Regan*, *supra*) were properly performing their judicial duty.

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

SEPTEMBER 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 60044

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
JUL 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-595

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,
Petitioner

v.

JOSEPH-A. FAUSTO,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF OF AMICUS CURIAE IN SUPPORT OF JUDGMENT BELOW

JOHN M. NANNES
Amicus Curiae,
invited by Court
per Order of
March 2, 1987
SKADDEN, ARPS, SLATE
MEAGHER & FLOM
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7400

July 10, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

The Civil Service Reform Act of 1978 ("CSRA") contains provisions addressing the circumstances in which competitive service and preference eligible employees may obtain judicial review of adverse action. The question presented is whether Congress intended, at the time it enacted the CSRA, to repeal statutory provisions that had historically accorded nonpreference excepted service employees rights to judicial review under the Tucker Act of claims arising under the Back Pay Act of 1966, even though the CSRA contains no express repeal of those statutes, the availability of judicial review for such employees would not conflict with remedies established in the CSRA for competitive service and preference eligible employees, and there is no other indication that Congress intended to repeal remedies that were available to nonpreference excepted service employees prior to enactment of the CSRA.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	7
ARGUMENT	12
I. PRIOR TO ENACTMENT OF THE CSRA, A PERSON IN MR. FAUSTO'S SITUATION WOULD HAVE BEEN ENTITLED TO JUDICIAL REVIEW	12
II. THERE IS NO BASIS FOR CONCLUDING THAT CONGRESS INTENDED THE CSRA TO PRECLUDE NONPREFERENCE EXCEPTED SERVICE EMPLOYEES FROM OBTAINING JUDICIAL REVIEW OF WRONGFUL REMOVALS	15
A. The Language of the CSRA Does Not Preclude or Address the Circumstances in Which Nonpreference Excepted Service Employees May Obtain Judicial Review of Wrongful Removals	16
B. The Availability of Judicial Review for Nonpreference Excepted Service Employees Does Not Conflict With or Undermine Remedies Created by the CSRA	19
C. The Legislative History of the CSRA Does Not Indicate an Intention to Extinguish Rights of Judicial Review for Nonpreference Excepted Service Employees	21

TABLE OF CONTENTS—Continued

	Page
D. Decisions of Other Courts Provide No Precedent for Precluding Judicial Review in the Circumstances Presented Here	25
E. The Possibility of Disparate Treatment of Nonpreference Excepted Service Employees Does Not Make Judicial Enlargement of the CSRA Appropriate	28
CONCLUSION	31

TABLE OF AUTHORITIES

Cases:	Page
Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)	16
Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975)	15
Borrell v. United States International Communications Agency, 682 F.2d 981 (D.C. Cir. 1982)	26
Bowen v. Michigan Academy of Family Physicians, 106 S. Ct. 2133 (1986)	16
Brown v. GSA, 425 U.S. 820 (1976)	19, 20, 21
Bush v. Lucas, 462 U.S. 367 (1983)	13, 15, 19, 25, 30
Carducci v. Regan, 714 F.2d 171 (D.C. Cir. 1983)	25, 27
Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)	28
Crawford Fitting Co. v. J. T. Gibbons, Inc., 55 U.S.L.W. 4820 (U.S. June 15, 1987)	21
Cutts v. Fowler, 692 F.2d 138 (D.C. Cir. 1982)	26
Fausto v. *United States*, 7 Cl. Ct. 459 (1985)	6
Fausto v. United States, 783 F.2d 1020 (Fed. Cir. 1986)	6
Fausto v. United States, 791 F.2d 1554 (Fed. Cir. 1986)	6
Harrison v. Bowen, 815 F.2d 1505 (D.C. Cir. 1987)	26
Iselin v. United States, 270 U.S. 245 (1926)	11, 31
Jackson v. Veterans Administration, 768 F.2d 1325 (Fed. Cir. 1985)	29
Lindahl v. OPM, 470 U.S. 768 (1985)	16, 17
Lovshin v. Department of Navy, 767 F.2d 826 (Fed. Cir. 1985), *cert. denied*, 106 S. Ct. 1523-24 (1986)	24
Pinar v. Dole, 747 F.2d 899 (4th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985)	25
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974)	17
Rodriguez v. United States, 107 S. Ct. 1391 (1987)	11, 17, 30
Rosano v. United States, 800 F.2d 1126 (Fed. Cir. 1986), *cert. denied*, 107 S. Ct. 1350 (1987)	27
Sampson v. Murray, 415 U.S. 61 (1974)	13
Schwartz v. Department of Transportation, 714 F.2d 1581 (Fed. Cir. 1983)	26

TABLE OF AUTHORITIES—Continued

	Page
Service v. Dulles, 354 U.S. 363 (1957)	18
United States v. Borden Co., 308 U.S. 188 (1939)	17
United States v. Connolly, 716 F.2d 882 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1065 (1984)	26, 27
United States v. Mitchell, 445 U.S. 535 (1980)	14
United States v. Mitchell, 463 U.S. 206 (1983)	14
United States v. Testan, 424 U.S. 392 (1976)	14
Veit v. Heckler, 746 F.2d 508 (9th Cir. 1984)	26
Vitarelli v. Seaton, 359 U.S. 535 (1959)	9, 18
Watt v. Alaska, 451 U.S. 259 (1981)	15, 17
Wood v. United States, 41 U.S. (16 Pet.) 342 (1842)	17
Statutes and Regulations:	
Administrative Procedure Act, 5 U.S.C. §§ 701-706 (& Supp. 1985)	10, 25
Back Pay Act of 1966, 5 U.S.C. § 5596	5, 7, 12
5 U.S.C. § 5596(b)(1)	12
5 U.S.C. § 5596(b)(1)(A)	13
Civil Rights Act of 1866, 42 U.S.C. § 1981	20
Civil Rights Act of 1964, 42 U.S.C. § 2000e, amended by § 11, Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103	20
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111	6, 22
§ 205, 92 Stat. 1138	25
§ 702, 92 Stat. 1216	13
Ch. 12, 5 U.S.C. §§ 1201-1209:	
5 U.S.C. § 1206	24
Ch. 21, 5 U.S.C. §§ 2101-2109:	
5 U.S.C. § 2102(a)(1)(A)	2
Ch. 23, 5 U.S.C. §§ 2301-2305:	
5 U.S.C. § 2302(a)(2)(B)	24
Ch. 43, 5 U.S.C. §§ 4301-4315:	
5 U.S.C. § 4301(2)	24
5 U.S.C. § 4302	23
5 U.S.C. § 4303(e)	26

TABLE OF AUTHORITIES—Continued

	Page
Ch. 75, 5 U.S.C. §§ 7501-7543:	
5 U.S.C. § 7501	20, 27
5 U.S.C. § 7502	20
5 U.S.C. § 7503	28
5 U.S.C. § 7511	2, 20, 27
5 U.S.C. § 7511(c)	23
5 U.S.C. § 7512	20
5 U.S.C. § 7512(1)	15
5 U.S.C. § 7513	28
5 U.S.C. § 7513(d)	20
Ch. 77, 5 U.S.C. §§ 7701-7703:	
5 U.S.C. § 7701 (1976 ed.)	22
5 U.S.C. § 7701(a)(1)	29
5 U.S.C. § 7701(c)(1)(B)	29
5 U.S.C. § 7701(h)	29
5 U.S.C. § 7701(i)(1)	29
5 U.S.C. § 7703(a)(1)	20
5 U.S.C. § 7703(b)(1)	25
5 U.S.C. § 7703(d)	25
Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25	25
Tucker Act, 28 U.S.C. § 1491	5, 13
Youth Employment and Demonstration Projects Act of 1977, Pub. L. No. 95-93, 91 Stat. 627 (1977), codified at 29 U.S.C. § 993, *repealed by* Pub. L. No. 97-300, 96 Stat. 1357 (1982)	1
Exec. Order No. 11,491, 34 Fed. Reg. 17605 (1969)	22
5 C.F.R. § 315.201 (1977)	2
5 C.F.R. § 351 (1981)	4
5 C.F.R. § 1201.200-.222 (1987)	29
Legislative Materials:	
H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. (1978)	29
H.R. Rep. No. 32, 89th Cong., 1st Sess. (1965)	13
H.R. Rep. No. 1403, 95th Cong., 2d Sess. (1978)	13, 22, 29

TABLE OF AUTHORITIES—Continued

	Page
S. Rep. No. 969, 95th Cong., 2d Sess. (1978)	10, 23, 24, 27
S. Rep. No. 1062, 89th Cong., 2d Sess. (1966)	13
Other Authorities:	
Department of Interior Federal Personnel Manual —231 (May 4, 1981)	3
L. Sedivec, Congressional and Judicial Limitations on the Reviewability of Certain Administrative Decisions Taken Pursuant to Authority Delegated by Congress (October 1980) (unpublished paper of the Administrative Conference of the United States)	17
N. Singer, Sutherland Stat. Const. (4th ed. 1985)	17

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

No. 86-595

UNITED STATES OF AMERICA,
Petitioner
v.
JOSEPH A. FAUSTO,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF JUDGMENT BELOW

STATEMENT OF THE CASE

In 1977, Congress enacted the Youth Employment and Demonstration Projects Act of 1977 ("Youth Employment Act"), Pub. L. No. 95-93, 91 Stat. 627.[1] The Youth Employment Act established a Young Adult Conservation Corps ("YACC") to employ young adults in useful conservation work on Federal and non-Federal public lands and waters. Certain YACC camps were to be operated by the Fish and Wildlife Service ("FWS") of the Department of Interior ("Department"). The Department advertised the availability of excepted service positions to

[1] The Youth Employment Act was codified at 29 U.S.C. § 993. It was subsequently repealed. *See* Pub. L. No. 97-300, 96 Stat. 1357 (1982).

staff the YACC camps.[2] Respondent Joseph A. Fausto applied for and was awarded a managerial position at the YACC camp in Virginia. At the time of his appointment in January 1978, Mr. Fausto was a career-tenure employee in the competitive service.[3] The term of the YACC appointment, initially set not to exceed September 4, 1980, was later extended not to exceed September 30, 1982. Pet. App. 24a.

Mr. Fausto commenced work for YACC on January 8, 1978.[4] In 1980, he was assigned temporarily to the Bronx YACC camp in New York. After he returned to the YACC camp in Virginia, he was notified on November 21, 1980, that the FWS intended to dismiss him for alleged misconduct, including unauthorized use of a government vehicle, while on assignment in New York. Mr. Fausto was permitted to reply to the charges but was notified on January 2, 1981, that he would be dismissed on January 16, 1981. Pet. App. 2a.

[2] Federal civil service positions are classified as either competitive service or excepted service positions. Virtually all civil service positions in the executive branch, except positions which are specifically excepted, constitute the competitive service. 5 U.S.C. § 2102(a)(1)(A). The government advises the Court that there are approximately 500,000 excepted service employees, Brief for the United States at 2, n.1, but it should be noted that more than a quarter of excepted service employees are "preference eligibles," which means that they are treated in the same manner as competitive service employees with respect to the issues presented by this case. *See* 5 U.S.C. § 7511 (defining "employee" to mean competitive service and preference eligible employees). Therefore, the term "nonpreference excepted service employees" is used in this brief to refer to excepted service employees who are not preference eligibles.

[3] Mr. Fausto began working for the government on July 2, 1973. He became a career-tenure employee in the competitive service in 1977. *See* 5 C.F.R. § 315.201 (1977).

[4] The government filed a motion to dispense with the printing of an appendix in this case, which the Court granted on June 15, 1987. The key items in the record may be found at Exhibits A-G to Memorandum of Points and Authorities in Support of Motion of Plaintiff for Summary Judgment (July 25, 1983) ("Plaintiff's Motion") or at Attachments A-H to Defendant's Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment (Aug. 18, 1983) ("Defendant's Cross-Motion").

Following his dismissal, Mr. Fausto sought assistance from his U.S. Senator, who made inquiry to the Department. On February 29, 1982, the Department advised the Senator that, contrary to Departmental regulations, Mr. Fausto had not been advised at the time of his dismissal that he had the right to contest his separation from service through the Department's grievance procedure, which provided for "a right to a formal hearing conducted by a grievance examiner" for a career-type employee being separated for cause.[5] The Department informed the Senator that Mr. Fausto would be given an opportunity to contest his removal. However, it was not until March 22, 1982, more than fourteen months after he had been discharged, that the FWS advised Mr. Fausto that he had the right to file a formal grievance into the propriety of the decision to discharge him. Pet. App. 2a.

Mr. Fausto availed himself of his rights and filed a formal grievance. On June 30, 1982, without having accorded him a formal hearing, the FWS admitted that it should not have discharged Mr. Fausto. Many of the charges against him were found to be "*de minimus* and warranted no penalty." Pet. App. 2a. However, the FWS concluded that Mr. Fausto had used a government vehicle for personal use (to transport his ill newborn child from New York to the family home), for which a thirty-day suspension was warranted. The FWS therefore offered him back pay from February 15, 1981 (thirty days after he had been discharged), to September 18, 1981, the date upon which the YACC camp in Virginia had been closed.

[5] *See* Department of Interior Federal Personnel Manual—231, Pt. 370 DM 771.3.22A (May 4, 1981) (a "career-type" employee separated for cause "is accorded a right to a formal hearing conducted by a grievance examiner").

Pet. App. 2a. Mr. Fausto was given seven days within which to accept this offer or to appeal the matter further within the Department.

Mr. Fausto advised the FWS that he did not believe that the thirty-day suspension was warranted in the circumstances presented in his case. Furthermore, since he did not learn until receipt of the offer that the YACC camp had been closed on September 18, 1981, and that the FWS would deny him back pay for the period of time between that date and the date on which it admitted that his discharge had not been warranted, he asked for reconsideration of this determination as well.[6] The FWS re-

[6] Mr. Fausto might have been entitled to an award of back pay for this additional period of time for a number of reasons. First, the Department sought to attract applications for YACC positions from individuals then employed in the competitive service, such as Mr. Fausto, by providing that certain appointments to YACC positions would be made to "specially qualified career employees," who would be granted reemployment rights upon completion of the YACC program to positions equal in grade and pay to the ones they left to join the YACC program. *See* Attachment D to Defendant's Cross-Motion at 3-4. Second, YACC employees apparently were entitled to procedural protections applicable to reductions in force ("RIF"), which provided notice and an opportunity for a hearing at which employees could argue that they were entitled to another position. *See* 5 C.F.R. § 351 (1981). Third, former career employees were eligible to apply for reinstatement to another position in the competitive service without having to take the competitive examination again.

Although the Department maintained that Mr. Fausto was not a specially qualified employee, a finding that he contests, some of the employees at the YACC camp apparently did receive other positions at the time the camp was closed pursuant to RIF procedures, and even those who did not were eligible for reinstatement after the camp was closed. Of course, since Mr. Fausto had been removed from the Federal service effective January 16, 1981, he did not have an opportunity to compete (within the meaning of the RIF procedures) with other YACC employees for positions that remained available at other YACC camps and, since his personnel record at this time continued to show that he had been removed for cause, he was deprived of any meaningful opportunity to exercise his reinstatement rights.

fused to revise its offer in either respect and threatened to void the entire offer (including the award of back pay that the FWS had concluded was due to Mr. Fausto) unless he accepted it.

The Department's Office of Hearings and Appeals reviewed the FWS offer and concluded without a hearing that the offer of adjustment was appropriate. Pet. App. 25a. Mr. Fausto then presented his claim to the Office of the Secretary of the Interior. Pet. App. 25a. The Secretary's Director of Personnel ("Director") mistakenly asserted that Mr. Fausto's removal from service had already been cancelled and therefore concluded that a formal hearing was no longer required under the Department's regulations. The Director determined that Mr. Fausto was entitled to back pay only for the period between February 15 and September 18, 1981. He did find, however, that Mr. Fausto was entitled to reinstatement eligibility, but the Director did not explain how Mr. Fausto could have obtained another government position after the camp was closed when his personnel record indicated that he had been separated from the service for cause on January 16, 1981. *See* note 6, *supra*.

It was not until February 1, 1983, that the FWS officially cancelled Mr. Fausto's removal and awarded him back pay pursuant to the Back Pay Act of 1966 ("Back Pay Act"). However, on the same day the FWS also suspended Mr. Fausto for one month retroactively as of the date upon which he had been initially removed and terminated him involuntarily, effective September 18, 1981, from the position to which he had just been "restored." Pet. App. 25a.

Mr. Fausto filed a complaint against the United States in the United States Claims Court under the Back Pay Act, 5 U.S.C. § 5596. Asserting jurisdiction under the Tucker Act, 28 U.S.C. § 1491, Mr. Fausto sought back pay for the period from January 17, 1981, through February 1, 1983, the date upon which his removal was can-

celled. On cross-motions for summary judgment, the court granted summary judgment for the United States and dismissed the complaint. 7 Cl. Ct. 459 (1985). The court concluded that the Civil Service Reform Act of 1978 ("CSRA"), Pub. L. No. 95-454, 92 Stat. 1111, provided the exclusive means by which Federal employees could obtain judicial review of adverse actions; since the CSRA did not establish a right to judicial review of dismissals for cause of nonpreference excepted service employees, it followed that Mr. Fausto had no right to judicial review. Pet. App. 26a-27a. In the alternative, the court concluded that Mr. Fausto was not entitled to the relief he was seeking, even if he could pursue his claim under the Back Pay Act. Pet. App. 27a-29a.

The United States Court of Appeals for the Federal Circuit reversed. 783 F.2d 1020 (1986). It first found that an employee in Mr. Fausto's situation would have been able to obtain judicial review prior to enactment of the CSRA. Pet. App. 3a-4a. The court then rejected the government's contention that the CSRA implicitly repealed the Tucker Act and the Back Pay Act. The correct inquiry was whether Congress had withdrawn Tucker Act jurisdiction that otherwise would exist. The fact that the CSRA had replaced prior remedies with a new remedial system for other kinds of Federal employees did not support the proposition that Congress intended to eliminate remedies that nonpreference excepted service employees had enjoyed. Pet. App. 4a-6a. The court concluded that Mr. Fausto was not entitled to back pay for the period following his constructive removal on September 18, 1981, but directed that he be paid for the thirty-day period of his constructive suspension between January 16 and February 15, 1981. Pet. App. 6a-8a.

The government sought rehearing *en banc*. The court denied rehearing *en banc* but treated the suggestion as a petition for rehearing and issued a supplemental opinion. 791 F.2d 1554 (1986). The court rejected the government's contention that Mr. Fausto would not have had a right to judicial review prior to enactment of the CSRA. Pet. App. 11a-13a. Although the government claimed that the CSRA precluded judicial review for Mr. Fausto in any forum because the CSRA did not provide him with a remedy, the court believed that the remedies established by the CSRA for other kinds of employees provided no evidence of a congressional intent to repeal "an old and thoroughly tested remedy" enjoyed by nonpreference excepted service employees. Pet. App. 19a. The court was careful to distinguish cases in which courts had rejected efforts by employees "subject to the adverse action provisions of the CSRA [to assert] some sort of additional remedy." Pet. App. 22a. The court did not dispute the correctness of those decisions, but it could not find that the CSRA had "eliminate[d] the previously existing remedy" available to Mr. Fausto. Pet. App. 23a. For these reasons, the court denied the petition for rehearing.

On January 12, 1987, this Court granted the government's petition for a writ of certiorari, and on March 2, 1987, the Court granted Mr. Fausto's motion for leave to file a brief *pro se* and invited *amicus curiae* to submit a brief in support of the judgment below.

SUMMARY OF ARGUMENT

Prior to enactment of the CSRA, a person in Mr. Fausto's situation would have been entitled to judicial review. The Department's regulations provided that he was entitled to a formal hearing, and it is not disputed that the Department's failure to advise him of this right and to provide a hearing violated its regulations. Mr. Fausto filed a complaint under the Back Pay Act of 1966 ("Back Pay Act"), 5 U.S.C. § 5596, which provides that an employee who has "been affected by an unjustified or unwarranted personnel action" is entitled to back pay for the period during which the personnel action was in effect. The Tucker Act confers jurisdiction upon the

Claims Court in connection with claims against the United States based upon any Act of Congress or executive department regulation.

The court below expressly found that Mr. Fausto would have been able to maintain an action under the Back Pay Act prior to enactment of the CSRA, and the government has apparently abandoned the contrary argument in this Court. Thus, the effect of the government's argument that the CSRA establishes the exclusive means by which Federal employees may obtain judicial review of wrongful removals would be to deny Mr. Fausto any opportunity to obtain judicial review under the Back Pay Act even though the government has conceded that he was wrongfully discharged.

There is no basis for concluding that Congress intended such a result. The starting point for determination of congressional intent is the language of the CSRA. Although the CSRA establishes certain remedies for competitive service and preference eligible employees, no provision of the statute expressly directs that the rights to judicial review accorded to such employees were intended by Congress to repeal rights of judicial review previously enjoyed by other Federal employees.

The absence of express language in the CSRA addressing the availability of judicial review for nonpreference excepted service employees strongly implies that Congress did not intend to eliminate the availability of judicial review. First, the Court has indicated that it will presume Congress intended judicial review of administrative action absent a clear expression of congressional intent to the contrary. Thus, Congress typically employs explicit language when it intends to bar judicial review. Second, the government's argument would result in repeal by implication of statutory rights to judicial review available to employees such as Mr. Fausto prior to enactment of the CSRA. Repeals by implication are strongly

disfavored in the absence of a clear and manifest congressional intent. Third, it has been "well settled law" for three decades that an employing agency must comply with its regulations, Pet. App. 22a, and employees have been able to obtain judicial review to enforce agency compliance with personnel regulations. *See, e.g., Vitarelli v. Seaton*, 359 U.S. 535 (1959). If Congress had intended the result advocated now by the government, each of these factors suggests that Congress would have said so explicitly. The failure of Congress to do so undercuts the government's argument that Congress intended the CSRA to preclude judicial review for nonpreference excepted service employees.

While the Court has occasionally found in other cases that Congress implicitly repealed a statute because the remedies provided in that statute conflict with a later enactment, there is no such risk in the present situation. The availability of judicial review for nonpreference excepted service employees does not conflict with or undermine provisions of the CSRA. Chapter 75 of the CSRA, which provides that competitive service and preference eligible employees may appeal to the Merit Systems Protection Board ("MSPB") and obtain judicial review of the MSPB decision with respect to certain adverse actions, does not apply to nonpreference employees in the excepted service. Provisions of the CSRA simply do not address the availability of judicial review for nonpreference excepted service employees who are discharged. As a result, the decision below permitting Mr. Fausto to obtain judicial review cannot conflict with remedies provided by Chapter 75 to other kinds of employees. There is no risk that permitting nonpreference excepted service employees to exercise rights to judicial review that they have historically enjoyed will undermine the remedial scheme established by Congress for competitive service and preference eligible employees under Chapter 75 of the CSRA.

Furthermore, there is no support in the legislative history for the government's proposition that Congress intended to repeal the rights of nonpreference excepted service employees to obtain judicial review by failing to include them in the definition of "employees" within the meaning of Chapter 75. The CSRA created the Office of Personnel Management ("OPM") and the MSPB to bifurcate the managerial and adjudicatory personnel functions of the Civil Service Commission ("CSC"). Prior to enactment of the CSRA, preference eligible and competitive service employees were authorized to appeal adverse actions to the CSC. When the MSPB was established, it was assigned jurisdiction over those matters. The legislative history of the CSRA does not indicate that this transfer of functions was intended to serve the broader purpose of repealing rights to judicial review previously enjoyed by other kinds of Federal employees. *See* S. Rep. No. 969, 95th Cong., 2d Sess. 48 (1978).

Lower court decisions upon which the government relies did not address the availability of judicial review in circumstances present here. Certain of the decisions rejected efforts by employees covered by Chapter 75 to obtain judicial review pursuant to provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. These courts have reasoned that Congress, in providing that certain adverse actions may be appealed to the MSPB and the Federal Circuit, intended thereby to preclude review of other personnel actions under more general provisions of the APA by employees who are subject to Chapter 75. These decisions, and others rejecting implied causes of action under the CSRA and denying judicial review at the behest of probationary employees, are simply inapplicable to nonpreference employees in the excepted service who are not subject to Chapter 75 and whose causes of action fall within the provisions of the Tucker Act and the Back Pay Act.

In the absence of supportive statutory language or legislative history, the government contends that it would be illogical for Congress to accord nonpreference excepted service employees more generous rights than are enjoyed by competitive service employees and that Congress could not have intended such a result. However, it is not at all clear that nonpreference excepted service employees are treated more generously than competitive service employees. The CSRA provides important statutory pre-termination rights to competitive service employees that are not applicable to nonpreference excepted service employees. Employees within the meaning of Chapter 75 also enjoy substantial procedural and substantive rights by virtue of their ability to appeal to the MSPB, which are unavailable to nonpreference excepted service employees. The ability of nonpreference excepted service employees to commence an action in the Claims Court does not assure them of either a more expeditious or less costly decision than is available to competitive service employees from the MSPB.

Perhaps more importantly, the relief sought by the government in this case has been directed to the wrong branch of the Government. While the government may believe it would be illogical to provide nonpreference excepted service employees with more direct access to court and that Congress might not have so provided if it had considered the issue, this provides no basis for judicial enlargement of the scope of the CSRA. There are substantial dangers to the legislative process if statutes are construed in a manner intended to advance the broad purposes upon which they are allegedly predicated. *Rodriguez v. United States*, 107 S. Ct. 1391 (1987). "To supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926). The Court should not foreclose the only means by which an employee may obtain judicial redress for an agency's admitted vio-

lation of its own regulations unless Congress has clearly expressed such an intent by statutory language or legislative history. Congress has not done so here, and the court below correctly held that Mr. Fausto had a right to judicial review of his Back Pay Act claims under the Tucker Act.

ARGUMENT

I. PRIOR TO ENACTMENT OF THE CSRA, A PERSON IN MR. FAUSTO'S SITUATION WOULD HAVE BEEN ENTITLED TO JUDICIAL REVIEW

At the time Mr. Fausto was dismissed from his position at the YACC camp, the Department's regulations provided that a "career-type employee" separated for cause had "a right to a formal hearing conducted by a grievance examiner." *See* note 5, *supra*. It is conceded by all parties that Mr. Fausto was not advised of his rights or provided with a hearing when he was discharged and that the failure of the Department to do so violated its regulations.

When Mr. Fausto filed a grievance after he was advised of his rights fourteen months later, the FWS admitted that he should not have been discharged and decided to impose a thirty-day suspension instead. The Department awarded Mr. Fausto pay that he would have earned for the period commencing thirty days after he had been wrongfully discharged and extending to the date upon which the camp at which he was employed was closed; the Department cited the Back Pay Act of 1966 ("Back Pay Act"), 5 U.S.C. § 5596, as the basis for its award of back pay. *See* Exhibit E to Plaintiff's Motion.

Mr. Fausto filed a complaint under the Back Pay Act because he believed that the back pay awarded by the Department was inadequate under the Act. The Back Pay Act permits an employee who has "been affected by an unjustified or unwarranted personnel action," 5 U.S.C. § 5596(b)(1), to obtain back pay. The Act further provides that an employee "is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect . . . an amount equal to all or any part of the pay . . . which the employee normally would have earned or received during the period if the personnel action had not occurred. . . ." 5 U.S.C. § 5596(b)(1)(A). *See* note 6, *supra*.

The Back Pay Act established a comprehensive pay adjustment authority to "make whole" employees who had suffered erroneous or unwarranted personnel action. H.R. Rep. No. 32, 89th Cong., 1st Sess. 1 (1965). In the Act, Congress expressly identified the extension of back pay rights to employees in the excepted service as a primary objective and recognized that benefits would be awarded for unjustified or unwarranted removals and suspensions. S. Rep. No. 1062, 89th Cong., 2d Sess. 3 (1966). This Court has described the Back Pay Act as part of "an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and [provides] procedures—administrative and judicial—by which improper action may be redressed." *Bush v. Lucas*, 462 U.S. 367, 385 (1983). *See also Sampson v. Murray*, 415 U.S. 61, 90-91 (1974).[7]

Jurisdiction was predicated upon the Tucker Act, 28 U.S.C. § 1491. The Tucker Act confers jurisdiction upon the Claims Court "to render judgment upon any claim against the United States founded either upon . . . any Act of Congress or any regulation of an executive department." Since the United States may not be sued without its consent, the Tucker Act constitutes a waiver of sovereign immunity with respect to a claim coming

[7] The most recent substantive amendment to the Back Pay Act occurred in 1978 as part of the CSRA. Section 702 of the CSRA amended the Act to specify more precisely items for which recovery could be awarded, to allow recovery for attorney's fees and costs, and to permit restoration of annual leave that an employee would have earned during separation. 92 Stat. 1216. *See* H.R. Rep. No. 1403, 95th Cong., 2d Sess. 60-61 (1978).

within its terms. *United States v. Mitchell*, 463 U.S. 206 (1983). However, the Court has noted that the Tucker Act "does not create any substantive right enforceable against the United States for money damages," *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Mitchell*, *supra*, 463 U.S. at 216. The Tucker Act "is merely jurisdictional, and grant of a right of action must be made with specificity. . . . [E]ntitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *United States v. Testan*, 424 U.S. 392, 400 (1976), *quoting Eastport Steamship Corp. v. United States*, 178 Ct. Cl. 599, 607, 372 F.2d 1002, 1009 (1967). The Back Pay Act is such a statute. *Id.* at 405-06; Pet. App. 12a-13a.

The court below found that "[t]here is no doubt that prior to the CSRA an employee in Fausto's situation could have maintained a suit in the Court of Claims." Pet. App. 3a. After the initial decision, the government filed a suggestion for rehearing *en banc* and argued, apparently for the first time, that the court would not have had jurisdiction under the Tucker Act to entertain Mr. Fausto's claim, even before enactment of the CSRA. The court below rejected this contention after extended discussion. Pet. App. 11a-13a.

The government has now apparently abandoned the argument that Mr. Fausto would not have been entitled to judicial review prior to enactment of the CSRA. The government's contention that Federal employees cannot obtain judicial review of wrongful removals unless the CSRA provides them with such a right would have the effect of denying Mr. Fausto any opportunity to obtain judicial review of his claims under the Back Pay Act even though the government has conceded that he was wrongfully discharged. The issue in this case is neither whether Congress has the power to foreclose such review

nor whether to do so would be good policy, but rather whether Congress actually intended such a result.

II. THERE IS NO BASIS FOR CONCLUDING THAT CONGRESS INTENDED THE CSRA TO PRECLUDE NONPREFERENCE EXCEPTED SERVICE EMPLOYEES FROM OBTAINING JUDICIAL REVIEW OF WRONGFUL REMOVALS

At the time he was discharged from his position at the YACC camp, Mr. Fausto was a nonpreference excepted service employee. The parties agree that, as a nonpreference excepted service employee, Mr. Fausto was not an "employee" within the meaning of the provisions of the CSRA governing review of "adverse actions," which include removals, 5 U.S.C. § 7512(1). The issue presented by this case, therefore, is whether Congress, in enacting the adverse action provisions of the CSRA, intended to repeal rights to judicial review previously available to other kinds of employees who were not included within the definition of "employees" subject to the adverse action provisions of Chapter 75 of the CSRA.

The starting point for determination of congressional intent is the statutory language. *See, e.g., Watt v. Alaska*, 451 U.S. 259, 265-66 (1981); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring). Depending upon the results of that analysis, the Court may resort to other indicia of congressional intent such as the nature of the statutory scheme enacted by Congress and such legislative history as may illuminate congressional intent concerning the issue in dispute. *See, e.g., Bush v. Lucas*, 462 U.S. 367 (1983).

A. The Language of the CSRA Does Not Preclude or Address the Circumstances in Which Nonpreference Excepted Service Employees May Obtain Judicial Review of Wrongful Removals

The CSRA was a significant undertaking by Congress to reform the Nation's civil service laws. *Lindahl v. OPM*, 470 U.S. 768, 773 (1985). However, the CSRA itself is silent concerning the availability of judicial review for nonpreference excepted service employees. While the CSRA does expressly address the circumstances in which competitive service and preference eligible employees may seek judicial review of adverse action, nowhere in its brief does the government contend that any provision of the statute expressly states that the rights to judicial review accorded to those kinds of employees were intended by Congress to repeal rights of judicial review previously available to nonpreference excepted service employees.

1. The absence of any language in the CSRA providing that the remedies established by the CSRA are exclusive or repealing rights to judicial review previously enjoyed by nonpreference excepted service employees substantially undercuts the government's argument that Congress intended to deny judicial review for nonpreference excepted service employees. The Court has consistently stated that it will presume that Congress intended judicial review of administrative action to be available unless there is "persuasive reason" to believe that Congress intended otherwise. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). This standard "has been invoked time and again" when considering whether the government has overcome the strong presumption "that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 106 S. Ct. 2133, 2135, 2136 (1986).

In recognition of this presumption, Congress typically employs explicit language when it intends to bar judicial

review. *Lindahl v. OPM, supra*, 470 U.S. at 779-80. Congress knows how to include preclusion language in a statute if it intends to preclude judicial review.[8]

2. When the issue of congressional intent concerning judicial review arises in the context of implied repeal of a prior statute, the presumption in favor of judicial review is fortified by the aversion to repeals by implication. *Rodriguez v. United States*, 107 S. Ct. 1391 (1987). This Court has repeatedly refused to find repeals by implication in the absence of a clear repugnancy between the two statutes. "[I]t is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it; . . . [T]here must be a positive repugnancy between the provisions of the new law, and those of the old . . . ." *Wood v. United States*, 41 U.S. (16 Pet.) 342, 362-63 (1842). "When there are two acts upon the same subject, the rule is to give effect to both if possible. The intention of the legislature to repeal 'must be clear and manifest.'" *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (citations omitted). *See also Watt v. Alaska, supra*, 451 U.S. at 266-67; *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133 (1974).

The Court presumes that Congress was aware of the prior statute at the time it enacted the latter statute. "Therefore, the drafters should expressly designate the offending provisions rather than leave the repeal to arise by implication from the later enactment." N. Singer, Sutherland Stat. Const. § 23.10, at 346 (4th ed. 1985).

---

[8] A number of such statutes are collected in *Lindahl v. OPM, supra*, 470 U.S. at 780, n.13. A more exhaustive list of forty statutory preclusions of judicial review is collected in L. Sedivec, "Congressional and Judicial Limitations on the Reviewability of Certain Administrative Decisions Taken Pursuant to Authority Delegated by Congress," at Appendix (Oct. 1980) (unpublished paper of the Administrative Conference of the United States). Copies of this paper have been provided to the parties and lodged with the Clerk of the Court.

In the absence of a direct conflict making it impossible to give effect to both statutes, the proper judicial function is to give effect to both statutes; Congress always has the prerogative to direct a contrary result by enacting language to make its intention clear.

The reluctance to repeal statutes by implication serves the salutary function of giving deference to the important congressional objectives that frequently underlie enactment of the earlier statute. The present case illustrates this proposition. The Back Pay Act was specifically intended to provide substantive rights to excepted service employees, and the Tucker Act provides jurisdiction for claims founded upon an Act of Congress or regulation of an executive department. Neither the Back Pay Act nor the Tucker Act was repealed expressly in whole or in part at the time Congress enacted the CSRA, and the CSRA does not itself provide that the remedies it creates are intended to be exclusive. Indeed, Congress broadened the scope of the Back Pay Act as part of the CSRA, without any suggestion that it actually intended to narrow the enforceability of the Back Pay Act by nonpreference excepted service employees. *See* note 7, *supra*.

3. The absence of language in the CSRA addressing judicial review by nonpreference excepted service employees of wrongful removals takes on additional significance in light of numerous decisions permitting such employees to obtain judicial review of violations by agencies of their personnel regulations. This Court has stated that agencies must follow their regulations and has permitted employees to obtain judicial review when agencies fail to do so. *See, e.g., Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957). In *Vitarelli*, the Court rejected the argument that excepted service employees, as employees at will, may be discharged in violation of agency regulations; an agency that believes a regulation provides too generous rights to its

employees may amend it, but may not disregard it. As the court below noted, "[f]or three decades it has been the well settled law 'that an employing agency must comply with a regulation which it considered important enough to promulgate in the first place.'" Pet. App. 22a, *quoting Watson v. United States*, 142 Ct. Cl. 749, 756, 162 F. Supp. 755, 758-59 (1958).

Each of these factors—the presumption in favor of judicial review, the reluctance to repeal statutes by implication, and the historic availability of judicial review by excepted service employees to enforce agency compliance with regulations—undercuts the government's argument that Congress intended the CSRA to have such a broad preclusive effect even though Congress did not so indicate expressly in the statutory language. The language of the CSRA fails to support the government's exclusivity argument, and the absence of an express exclusivity provision suggests exactly the opposite proposition.

B. The Availability of Judicial Review for Nonpreference Excepted Service Employees Does Not Conflict With or Undermine Remedies Created by the CSRA

Although statutory language is the best evidence of congressional intent, the Court will frequently consider other indicia. *Bush v. Lucas, supra*, 462 U.S. at 378. When it is claimed that Congress created multiple remedies to redress particular claims, the Court may examine whether the availability of judicial review pursuant to one statute would conflict with or undermine the remedial scheme established by a later enactment. If there is such a risk, the Court may conclude that Congress would not have intended such a result and therefore must have intended the later enactment to supersede the earlier statute. *Brown v. GSA*, 425 U.S. 820 (1976). Such a risk, however, is not present in this case.

Chapter 75 of the CSRA governs treatment of adverse actions and divides them into two categories, suspension for fourteen days or less, 5 U.S.C. § 7502, and more severe actions (hereinafter "major adverse actions"). 5 U.S.C. § 7512. Covered employees may appeal major adverse actions to the MSPB. 5 U.S.C. § 7513(d). An employee "adversely affected or aggrieved by a final order or decision of the [MSPB] may obtain judicial review of the order or decision." 5 U.S.C. § 7703(a)(1).

However, the provisions of the CSRA governing adverse actions are applicable only to individuals in the competitive service or preference eligible employees, 5 U.S.C. §§ 7501 and 7511, but not to nonpreference excepted service employees such as Mr. Fausto. Since Chapter 75 does not apply to nonpreference excepted service employees, the decision below permitting Mr. Fausto to obtain judicial review of his wrongful removal does not conflict with provisions of the CSRA.

It is for this reason that the government's repeated reliance upon *Brown v. GSA*, *supra*, is of little assistance in resolving the present case. In cases such as *Brown*, in which the issue has been whether judicial review is available under one statute when another statute provides for review, the Court has focused upon whether the availability of such review would conflict with or undermine the remedy established by the other statute. In *Brown* itself, the Court considered whether a government employee could bring an action under the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981, when Congress had specifically provided a judicial remedy for claims of discrimination in federal employment in section 717 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, as added by section 11 of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. The Court first determined that Congress probably had intended that section 717 constitute the exclusive remedy for such

claims because Congress believed, at the time it enacted section 717, that there were no other means for obtaining judicial review. 425 U.S. at 825-28. However, the Court further concluded that allowing employees to sue under the Civil Rights Act of 1866 would undermine section 717 of the Civil Rights Act of 1964 because the "rigorous administrative exhaustion requirements and time limitations" of section 717 could be easily "circumvented by artful pleading," 425 U.S. at 833, if aggrieved persons could resort to alternative remedial schemes. The Court thus concluded that Congress must have intended section 717 to provide the exclusive remedy for such claims.

Such precedent can obviously have no application here, however, where the relevant provisions of the CSRA do not apply to Mr. Fausto. Permitting Mr. Fausto to obtain judicial review under the Tucker Act of claims predicated upon the Back Pay Act does not conflict with the CSRA because Mr. Fausto has no rights under the adverse action provisions of the CSRA. Furthermore, the availability of relief for Mr. Fausto does not imply that competitive service or preference eligible employees—to whom the provisions of the CSRA do apply—will be able to obtain judicial review in the Claims Court. The government thus "proffer[s] the ultimate" in implied repeals: repeal without an inconsistency between the two relevant statutes. *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 55 U.S.L.W. 4820, 4821 (U.S. June 15, 1987).

C. The Legislative History of the CSRA Does Not Indicate an Intention to Extinguish Rights of Judicial Review for Nonpreference Excepted Service Employees

The government argues that Congress demonstrated its intent to repeal the rights of nonpreference excepted service employees to obtain judicial review by failing to include them in the definition of "employees" within the

meaning and scope of Chapter 75. There is, however, absolutely no indication in the legislative history of the CSRA that Congress intended thereby to extinguish rights previously extended to nonpreference excepted service employees, and the evolution of the relevant provisions of the CSRA belies any such suggestion.

The CSRA addressed many different aspects of federal employment including merit system principles, civil service functions, staffing, senior executive service, merit pay, and federal service labor-management relations. Pub. L. No. 95-454, 92 Stat. 1111. However, Congress addressed some civil service problems in different ways, and some not at all. The fact that the CSRA was an ambitious congressional effort constitutes merely the starting point, rather than the stopping point, for determination of congressional intent.

One of the major accomplishments of the CSRA was the bifurcation of the managerial and adjudicatory personnel functions which, at the time, were exercised by the Civil Service Commission ("CSC"). The CSC was abolished and replaced by the Office of Personnel Management ("OPM") and the MSPB. The OPM was created to administer the personnel system, and the MSPB was created to "take over the appellate authority . . . vested in the [CSC]." H.R. Rep. No. 1403, 95th Cong., 2d Sess. 6 (1978).

Congress thus enacted provisions necessary to transfer the CSC adjudicatory functions to the MSPB. Prior to enactment of the CSRA, preference eligible employees could seek review by the CSC of removal or suspension without pay for more than thirty days, 5 U.S.C. § 7701 (1976 ed.), as could competitive service employees pursuant to Section 22 of Exec. Order No. 11,491, 34 Fed. Reg. 17605 at 17614 (1969). In amending Chapter 75 to provide for appeals of major adverse actions to the MSPB, the CSRA merely codified this practice by defining the term "employee" to include competitive service

and preference eligible employees. *See* S. Rep. No. 969, 95th Cong., 2d Sess. 48 (1978). There is no indication in the legislative history of the CSRA that Congress had a broader purpose in mind, i.e. to change the rights and remedies available to nonpreference excepted service employees, when it transferred the adjudicatory functions of the CSC to the MSPB.[9]

In the absence of support from the legislative history of Chapter 75, the government contends that the inclusion of nonpreference excepted service employees in other provisions of the CSRA proves that Congress, by failing to include those employees in Chapter 75, intended not only to deny them the benefits of Chapter 75 but also to repeal all other judicial remedies they had previously enjoyed. The inclusion of nonpreference excepted service employees in Chapter 43 and Chapter 23 of the CSRA do not support this proposition, however, because of the different evolution and purpose of these provisions.

Chapter 43 of the CSRA directs agencies to develop performance appraisal systems, 5 U.S.C. § 4302. The development of such systems played a key role in the effort by Congress to implement merit principles in the

---

[9] The CSRA does permit OPM to make the provisions of Chapter 75 applicable to additional employees. 5 U.S.C. § 7511(c). The government contends that Congress intended to deny nonpreference excepted service employees the protections of Chapter 75 unless and until OPM elected to make those provisions applicable to such employees. Brief for the United States at 19-20. As the court below recognized, however, Mr. Fausto does not contend that he is entitled to the rights established by Chapter 75. Pet. App. 17a. To be relevant, the government would have had to argue that the discretionary authority of OPM to make Chapter 75 rights available to nonpreference excepted service employees indicates that Congress believed that such employees should not have any rights to judicial review unless OPM exercised this discretion and therefore Congress intended to repeal the rights to judicial review enjoyed by those employees. However, it takes a considerable leap of faith to read § 7511(c) in such an expansive and preclusive manner, and it is notable that even the government has not done so.

executive branch. The definition of employees to whom performance appraisal systems would be applicable includes nonpreference excepted service employees, 5 U.S.C. § 4301(2). These changes were "sweeping and extensive," *Lovshin v. Department of Navy*, 767 F.2d 826, 833 (Fed. Cir. 1985), *cert. denied*, 106 S. Ct. 1523-24 (1986). At the same time, Congress established the Office of Special Counsel of the MSPB to investigate allegations of prohibited personnel practices, 5 U.S.C. § 1206, committed against a person in a covered position, which included the excepted service. 5 U.S.C. § 2302(a)(2)(B). These provisions of the CSRA, like the provisions of Chapter 43, are intended to facilitate implementation of merit principles.

The legislative history of the CSRA indicates that these provisions were intended to have broad application throughout the Federal system and represented the principal changes in the law. S. Rep. No. 969, 95th Cong., 2d Sess. 2 (1978). This contrasts sharply with the evolution of the amendments to Chapter 75, which served the more limited function of codifying CSC adjudicatory jurisdiction and transferring it to the MSPB. S. Rep. No. 969, 95th Cong., 2d Sess. 48 (1978). The provisions of Chapters 43 and 23 do not serve as interpretive aids to congressional intention underlying Chapter 75, especially when the legislative history of Chapter 75 is unambiguous. Thus, the inclusion of nonpreference excepted service employees in Chapter 43 and Chapter 23 does not suggest, let alone demonstrate, that the failure of Congress to include those employees in Chapter 75 represented a decision to repeal the Tucker Act and the Back Pay Act insofar as those statutes accorded nonpreference excepted service employees rights to judicial review of wrongful removals.

D. Decisions of Other Courts Provide No Precedent for Precluding Judicial Review in the Circumstances Presented Here

To support its position in this Court, the government relies upon a number of lower court decisions holding that Federal employees could not obtain judicial review in various circumstances in which the CSRA did not provide them with such a remedy. None of those decisions addressed the availability of judicial review to a person in circumstances analogous to Mr. Fausto, and the decision below upholding Mr. Fausto's right to judicial review is not inconsistent with the holdings in those cases.

1. Most of the cases relied upon by the government involve competitive service employees who were expressly covered by the provisions of Chapter 75. These employees sought judicial review pursuant to provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, to obtain relief in circumstances in which Chapter 75 did not authorize judicial review. *See, e.g., Carducci v. Regan*, 714 F.2d 171 (D.C. Cir. 1983); *Pinar v. Dole*, 747 F.2d 899 (4th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985). The courts reasoned in these cases that Congress intended to replace the old system of administrative appeals to the CSC and judicial review pursuant to the APA with a system of administrative appeals to the MSPB and judicial review in the Court of Claims or a United States Court of Appeals.[10] *Cf. Bush v. Lucas*, 462 U.S. 367 (1983). Insofar as the CSRA defined adverse

[10] The CSRA directed that petitions for review of a final order or final decision of the MSPB be filed in the Court of Claims or a United States Court of Appeals. *See* § 205 of the CSRA, 92 Stat. 1138, 1143, *amending* 5 U.S.C. § 7703(b)(1). The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, established the United States Court of Appeals for the Federal Circuit and provided that the court would have exclusive jurisdiction "of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to Sections 7703(b)(1) and 7703(d) of title 5."

actions, distinguished between major and minor adverse actions, and provided for MSPB and judicial review only with respect to major adverse actions, these courts understandably concluded that Congress intended to preclude judicial review for lesser personnel actions involving Chapter 75 employees. The rationale of such cases can hardly be extended to nonpreference excepted service employees who were not included as "employees" within the meaning of Chapter 75 and as to whom it cannot be seriously argued that Congress elected to substitute a new remedial system for remedies that had previously been available.[11]

2. The government goes to considerable length, *see* Brief for the United States at 22-24, to refute an argument that Mr. Fausto did not make below. Pet. App. 17a. Numerous decisions are cited for the proposition that there is no implied right of action under the CSRA.[12]

---

[11] The other lower court decision upon which the government principally relies is *Harrison v. Bowen*, 815 F.2d 1505 (D.C. Cir. 1987). Unlike the former decisions, *Harrison* involved a suit brought by an excepted service employee. However, the claim was based upon performance appraisal standards governed by Chapter 43 of the CSRA, rather than Chapter 75. The definition of "employee" for purposes of Chapter 43 expressly includes excepted service employees but does not provide for judicial review by nonpreference excepted service employees of performance appraisal decisions. *See* 5 U.S.C. § 4303(e). Thus, the conclusion that the employee in *Harrison* could not obtain judicial review pursuant to the APA was governed largely by express language of the statute, which supported the proposition that Congress did not intend that nonpreference excepted service employees be able to obtain judicial review of Chapter 43 decisions. *Cf. Veit v. Heckler*, 746 F.2d 508 (9th Cir. 1984).

[12] *See, e.g., Schwartz v. Department of Transportation*, 714 F.2d 1581 (Fed. Cir. 1983); *United States v. Connolly*, 716 F.2d 882 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1065 (1984). *See also Borrell v. United States International Communications Agency*, 682 F.2d 981 (D.C. Cir. 1982); *Cutts v. Fowler*, 692 F.2d 138 (D.C. Cir. 1982); *Harrison v. Bowen*, 815 F.2d 1505 (D.C. Cir. 1987).

However, Mr. Fausto's complaint did not allege an implied cause of action under the CSRA. It was based instead upon the substantive rights conferred under the Back Pay Act arising from violation of his rights by the Department. Thus, the government's prolonged effort to establish that there is no implied cause of action under the CSRA, while perhaps of academic interest, has no direct bearing upon disposition of this case.

3. Finally, the government expresses concern that upholding the decision below would permit probationary employees to obtain judicial review of adverse actions; indeed, the government goes so far as to state that the decision below "would imply that the court of appeals in *Carducci* erred." Brief for the United States at 36. Unlike the government, however, the Federal Circuit has been able to distinguish between the two situations. In both *United States v. Connolly*, 716 F.2d 882 (1983), *cert. denied*, 465 U.S. 1065 (1984), and *Rosano v. United States*, 800 F.2d 1126 (1986), *cert. denied*, 107 S. Ct. 1350 (1987), the Federal Circuit concluded that probationary employees do not have a right to obtain judicial review of adverse actions. Those decisions were based upon the express exclusion of probationary employees from the definition of employees in Chapter 75, *see* 5 U.S.C. §§ 7501 and 7511, and clear indications in the legislative history that Congress did not intend judicial review for probationary employees. *See* S. Rep. No. 969, 95th Cong., 2d Sess. 45 (1978). By contrast, there is neither statutory language nor legislative history indicating a congressional intent to repeal rights that nonpreference excepted service employees had previously enjoyed. Pet. App. 21a. Furthermore, since Mr. Fausto was a career-tenure employee (rather than a probationary employee) at the time that he was discharged, the decision below provides no precedent for attempts by probationary employees to obtain judicial review, as decisions of the Federal Circuit have demonstrated.

None of the foregoing lines of authority supports the proposition that Congress must have intended to repeal the Tucker Act insofar as it would permit a career-tenure nonpreference excepted service employee, such as Mr. Fausto, to enforce substantive rights created by the Back Pay Act for an agency's conceded violation of its regulations. Indeed, insofar as those decisions are based upon express language in the CSRA or legislative history specifically addressing the manner in which the CSRA should be applied, the holdings are perfectly consistent with the decision below to uphold Mr. Fausto's right to judicial review in the absence of language or legislative history indicating a contrary congressional intention.

E. The Possibility of Disparate Treatment of Nonpreference Excepted Service Employees Does Not Make Judicial Enlargement of the CSRA Appropriate

Ultimately, the government's argument is reduced to the proposition that it would be illogical for Congress to have extended more generous rights to excepted service employees than to competitive service employees, and thus Congress could not have intended such a result. However, the premise of the government's argument is certainly disputable, and the proper forum for such an argument, even if true, is the Congress.

It is not at all clear that nonpreference excepted service employees are treated more generously than competitive service employees. This Court has recognized the importance to employees of pre-termination (rather than post-termination) rights. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Competitive service and preference eligible employees are entitled by statute to advance written notice of any proposed adverse action, an opportunity to answer and to furnish evidence, representation by an attorney, and a written decision containing the specific reasons for the adverse action, 5 U.S.C. §§ 7503 and 7513. Nonpreference excepted service em-

ployees enjoy only such rights as may be provided by agency regulation. Thus, it is obvious that the CSRA provides more generous pre-termination rights to competitive service and preference eligible employees than are guaranteed to nonpreference excepted service employees.

Furthermore, employees within the meaning of Chapter 75 have the right to appeal major adverse actions to the MSPB. The MSPB was established to provide employees with an impartial forum to determine appeals of adverse actions. *See* H.R. Rep. No. 1403, 95th Cong., 2d Sess. 6-7 (1978). Congress enacted various provisions that operate to the advantage of employees. An employee has a right to a hearing on the record, 5 U.S.C. § 7701(a)(1), even though no similar right is accorded by statute to the employing agency. Congress deliberately placed the burden of proof on the employing agency, H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 138 (1978), and directed that the decision of the employing agency shall be sustained only if supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B). "By seeking 'review,' an employee puts the agency in the position of a plaintiff bearing the burden of first coming forward with evidence to establish the fact of misconduct, the burden of proof, and the ultimate burden of persuasion, with respect to the basis for the charge or charges. The employee (while denominated appellant) has the advantageous evidentiary position of a defendant with respect to that aspect of the case." *Jackson v. Veterans Administration*, 768 F.2d 1325, 1329 (Fed. Cir. 1985). The MSPB must issue a decision expeditiously, 5 U.S.C. § 7701(i)(1), and is authorized to establish alternative methods of dispute resolution, available at the option of the employee, to further expedite disposition of employee appeals. 5 U.S.C. § 7701(h).[13] Thus, the availability of MSPB review for competitive service employees provides them with important procedural and substantive rights

[13] *See* 5 C.F.R. § 1201.200-.222 (1987), which establishes procedures for voluntary expedited appeals.

not enjoyed by nonpreference excepted service employees. The fact that nonpreference excepted service employees may have the right to commence an action in the Claims Court if their rights under the Back Pay Act have been violated does not assure them of either an expeditious decision or an economical one. As Justice Marshall and Justice Blackmun observed in *Bush v. Lucas*, *supra*, 462 U.S. at 391, "an administrative action is likely to prove speedier and less costly than a lawsuit." It is by no means clear that the rights enjoyed by nonpreference excepted service employees are more generous than rights enjoyed by competitive service and preference eligible employees.

Second, and perhaps more importantly, the relief sought by the government in this case has been directed to the wrong branch of Government. The government may believe that it would be illogical to provide nonpreference excepted service employees with more direct access to court than competitive service employees and that Congress might not have so provided if it had expressly considered the rights that should be made available to nonpreference excepted service employees. However, there are substantial dangers to the legislative process if statutes are construed by courts in a manner intended to further "the broad purposes" believed to underlie them.

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law. Where, as here, "the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . '[there is no occasion] to examine the additional considerations of "policy" . . . that may have influenced the lawmakers in their formulation of the statute.' "

Rodriguez v. United States, 107 S. Ct. 1391, 1393 (1987) (emphasis in original, citations omitted).

It does not fall to this Court to mend the holes in a congressional tapestry. "What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926). It does not misallocate the responsibilities of governance to require the legislative branch to state its will clearly —whether by statutory language or legislative history— before a court will conclude that Congress intended to repeal the only means by which an employee may obtain judicial review of an admitted violation by an agency of its own regulations. Congress has not done so here, and the court below correctly held that Mr. Fausto had a right to judicial review under the Tucker Act of his Back Pay Act claims.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the United States Court of Appeals for the Federal Circuit should be affirmed.

Respectfully submitted,

JOHN M. NANNES
Amicus Curiae,
invited by Court
per Order of
March 2, 1987
SKADDEN, ARPS, SLATE
MEAGHER & FLOM
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7400

July 10, 1987

AMICUS CURIAE

BRIEF

(5)

No. 86-595

Supreme Court, U.S.
FILED
JUL 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,
Petitioner,

v.

JOSEPH A. FAUSTO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF FOR *AMICUS CURIAE* AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO IN SUPPORT OF RESPONDENT

MARK D. ROTH *
General Counsel
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
80 F Street, N.W.
Washington, D.C. 20001
(202) 639-6424

KEVIN M. GRILE
Staff Counsel
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
446 North Central Avenue
Northfield, Illinois 60093
(312) 446-9486

July, 1987

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION INVOLVED

Whether the Civil Service Reform Act of 1978 (CSRA) precludes previously available judicial review under the Tucker Act of a claim by a Federal employee, whose right, as a consequence of his nonpreference eligible and excepted service status, to challenge a removal taken in violation of agency regulation is not addressed in the CSRA where the CSRA or its legislative history contain no indication of a Congressional desire to restrict Tucker Act jurisdiction and where there is no indication that Congress considered the remedies available to a nonpreference eligible excepted service employee?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	6
ARGUMENT:	
A. The CSRA Does Not Preclude Tucker Act Jurisdiction Over A Suit By A Nonveteran Excepted Service Employee Alleging Violation Of Agency Regulations	8
B. The Government's Theory That Tucker Act Jurisdiction Is Precluded By The CSRA Ignores Those Areas Of Federal Personnel Law That Were Unaffected By The CSRA And Remain Subject To Judicial Review	19
CONCLUSION	23

TABLE OF AUTHORITIES

Cases: Page

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 10
Albernaz v. United States, 450 U.S. 333 (1981) 15
Barnhart v. Devine, 771 F.2d 1515 (D.C. Cir. 1985) 22
Batchelor v. United States, 169 Ct. Cl. 180, *cert. denied*, 382 U.S. 870 (1965) 9, 10, 15-16
Bendure v. United States, 554 F.2d 427 (Ct. Cl. 1977) 20
Block v. Community Nutrition Institute, 467 U.S. 340 (1984) 5, 11
Bowen v. Michigan Academy of Family Physicians, —— U.S. ——, 106 S. Ct. 2133 (1986) 10
Boyle v. United States, 515 F.2d 1397 (Ct. Cl. 1975) 14
Brousseau v. United States, 640 F.2d 1235 (Ct. Cl. 1981) 13
Burroughs v. Office of Personnel Management, 764 F.2d 1300 (9th Cir. 1985) 16, 21-22
Bush v. Lucas, 462 U.S. 367 (1983) 5
Carducci v. Regan, 714 F.2d 171 (D.C. Cir. 1983) 17
Data Processing Service v. Camp, 397 U.S. 150 (1970) 11
Fausto v. United States, 7 Cl. Ct. 459 (1985) 3-4
Fausto v. United States, 783 F.2d 1020 (Fed. Cir. 1986) 2-3, 4-5
Fausto v. United States, 791 F.2d 1554 (Fed. Cir. 1986) 3, 5-6
Greenway v. United States, 163 Ct. Cl. 72 (1963) 10, 15, 16
Harrison v. Bowen, 815 F.2d 1505 (D.C. Cir. 1987) 17
Kester v. Horner, 778 F.2d 1565 (Fed. Cir. 1985) 21
Lovshin v. Department of the Navy, 767 F.2d 826 (Fed. Cir. 1985), *cert. denied*, —— U.S. ——, 106 S. Ct. 1523 (1986) 14
McClary v. United States, 775 F.2d 280 (Fed. Cir. 1985) 4, 16-17

TABLE OF AUTHORITIES—Continued

Page

National Maritime Union v. United States, 682 F.2d 944 (Ct. Cl. 1982) 21
O'Neall v. United States, 797 F.2d 1576 (Fed. Cir. 1986) 21
Pascal v. United States, 543 F.2d 1284 (Ct. Cl. 1976) 13
Pinar v. Dole, 747 F.2d 899 (4th Cir. 1984), *cert. denied*, 471 U.S. 1001 (1973) 17
Polcover v. Secretary of the Treasury, 477 F.2d 1223 (D.C. Cir.), *cert. denied*, 414 U.S. 1001 (1973) 13
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 4, 11
Rodriguez v. United States, —— U.S. ——, 107 S. Ct. 1391 (1987) 11
Sam v. United States, 682 F.2d 925 (Ct. Cl. 1982) 20
Sanford v. Weinberger, 752 F.2d 636 (Fed. Cir. 1985) 21
Service v. Dulles, 354 U.S. 363 (1957) 11
Sullivan v. United States, 665 F.2d 1012 (Ct. Cl. 1981) 20
United States v. Connolly, 716 F.2d 882 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1065 (1984) 5
United States v. Erika, Inc., 456 U.S. 201 (1982) 5
United States v. Testan, 424 U.S. 392 (1976) 9
Veit v. Heckler, 746 F.2d 508 (9th Cir. 1984) 16
Vitarelli v. Seaton, 359 U.S. 535 (1959) 10, 11
Young v. Hampton, 568 F.2d 1253 (7th Cir. 1977) 13

Statutes:

Back Pay Act, 5 U.S.C. 5596 ..... 4, 8
5 U.S.C. 5596(b) 9
Civil Service Reform Act of 1978, Pub. L. 95-454:
5 U.S.C. 2302(a)(2) 22
5 U.S.C. Chapter 43 ..... 13, 14
5 U.S.C. 4303(e) 14
5 U.S.C. 5361 *et seq.* 20
5 U.S.C. 7121(e) 12, 14

TABLE OF AUTHORITIES—Continued

	Page
5 U.S.C. 7121(f)	13
5 U.S.C. Chapter 75	14
5 U.S.C. 7511(a)	9
5 U.S.C. 7511(a)(1)	12
5 U.S.C. 7513(a)	12
5 U.S.C. 7513(d)	12
5 U.S.C. 7703	13
Title IV, 92 Stat. 1154	20, 21
Section 407, 92 Stat. 1171	20
Section 906(a), 92 Stat. 1224	10, 20, 21
Fair Labor Standards Act	20, 21
29 U.S.C. 203(e)(2)	20
Federal Courts Improvement Act of 1982, Pub. L. 97-164:	
5 U.S.C. 7703(b)	13
28 U.S.C. 1295(a)(2)	21
Tucker Act:	
28 U.S.C. 1346(a)(2)	21
28 U.S.C. 1491	8, 15
28 U.S.C. 1491 (1976)	15
28 U.S.C. 1491(a)(1)	8, 11, 15
5 U.S.C. 2102	2
5 U.S.C. 2103(a)	2
5 U.S.C. 2108(3)	2
5 U.S.C. 3302(1)	2
5 U.S.C. Chapter 51	21
5 U.S.C. 5112	22
5 U.S.C. Chapter 53	19
5 U.S.C. 5333(b)	20
5 U.S.C. 5334(a)	20
5 U.S.C. 5343(c)(4)	20, 21
5 U.S.C. 5348	21
5 U.S.C. Chapter 55, Subchapter V	19
5 U.S.C. 5542(a)	21

TABLE OF AUTHORITIES—Continued

	Page
5 U.S.C. Chapter 57	20
5 U.S.C. Chapter 59	20
5 U.S.C. 5941	21
5 U.S.C. Chapter 63	20
5 U.S.C. Chapter 75 (1976)	14
5 U.S.C. 7501(a) (1976)	13
5 U.S.C. 7512(a) (1976)	13
Regulations:	
5 C.F.R. Part 6	2
5 C.F.R. Part 213	2
Miscellaneous:	
Department of Interior Regulation 370 DM 771.3.3B	3
S. Rep. 95-969, 95th Cong., 2d Sess. 63 (1978)	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-595

UNITED STATES OF AMERICA,
Petitioner,

v.

JOSEPH A. FAUSTO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF FOR *AMICUS CURIAE* AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO IN SUPPORT OF RESPONDENT

The American Federation of Government Employees, AFL-CIO (AFGE) hereby files its brief as *amicus curiae* in support of respondent Joseph A. Fausto.

INTEREST OF THE *AMICUS CURIAE*

AFGE is the largest labor organization representing nonpostal Federal workers. Altogether, AFGE and/or its affiliated locals and councils represent approximately 700,000 employees of the United States in certified bar-

gaining units. Included in many of these bargaining units are employees holding positions in the "excepted service." As an organization dedicated to the protection of the rights of its members, AFGE is concerned that the extent of its members' access to Federal courts be fully recognized.

Furthermore, while the issue in this case is quite narrow, the petitioner's argument creates a blueprint for infringement on the access of all Federal workers to judicial review. Rights in many areas of Federal employment law, such as pay and classification, predate the Civil Service Reform Act of 1978 (CSRA) and were substantively unaddressed and unaffected by the CSRA. In order to protect the traditional rights of access to judicial review for all AFGE members, AFGE has an interest in bringing to this Court's attention some of the areas in Federal employment in which judicial review remains available without regard to the CSRA.

STATEMENT OF THE CASE

1. Respondent Joseph A. Fausto was an employee of the Fish and Wildlife Service (FWS) of the Department of the Interior (agency) holding an excepted service position under a term appointment.[1] Fausto was not employed as a preference eligible (i.e. under a veteran's preference) as defined in 5 U.S.C. 2108(3). 783 F.2d at

[1] The "excepted service" consists of Federal employment positions not in the competitive service or the Senior Executive Service. 5 U.S.C. 2103(a). The competitive service generally consists of all positions in the executive branch unless specifically excluded. 5 U.S.C. 2102. Excepted service positions include positions for which it is impractical to hold a competitive examination and policy-making positions or positions with a close working relationship with an agency head or key appointed officials. 5 C.F.R. Part 213. Positions are excepted from the competitive service pursuant to rules issued by the President. 5 U.S.C. 3302(1); 5 C.F.R. Part 6 (Rule VI).

1021.[2] In January 1981, Fausto was removed from his position by FWS for alleged misconduct. *Id.* At the time of his removal, Fausto was entitled, under agency regulations, to a formal hearing conducted by a grievance examiner. *Id.* The agency regulations also required that "[f]ormer employees must file a timely grievance concerning a matter appropriate for review under these procedures prior to separation in order to receive consideration." 791 F.2d at 1555, citing 370 DM 771.3.3B. However, FWS did not inform Fausto of his grievance rights at the time that Fausto was told of his removal. 783 F.2d at 1021.

Approximately fourteen months following his removal, FWS told Fausto that he had not been apprised of his grievance rights and offered Fausto the opportunity to challenge his removal. Fausto then filed a formal grievance. In June, 1982, FWS concluded, based on the administrative file *without a hearing*, that removal had been too harsh a penalty for Fausto's alleged misconduct. Instead, FWS substituted a thirty day suspension for removal and awarded Fausto back pay from the day the thirty day suspension would have ended until the date that his facility closed. Fausto regarded this relief as inadequate and unsuccessfully pursued his administrative claim up to the Secretary of the Interior. 783 F.2d at 1021.

2. Fausto then filed suit against the United States in the United States Claims Court. There the Government moved for summary judgment contending that the Civil Service Reform Act of 1978 (CSRA), Pub. L. 95-454, 92 Stat. 1111, precluded jurisdiction by the court over Fausto's suit. The Claims Court granted the Govern-

[2] References in the Statement of the Case will be to the opinion of the court of appeals in *Fausto v. United States*, 783 F.2d 1020 (Fed. Cir. 1986) and to the opinion of the court of appeals on rehearing. *Fausto v. United States*, 791 F.2d 1554 (Fed. Cir. 1986).

ment's motion, interpreting the CSRA to comprise "a comprehensive catalogue of remedies for adverse personnel actions." *Fausto v. United States*, 7 Cl. Ct. 459, 461 (1985).

3. The Federal Circuit reversed. The court of appeals first noted its earlier holding in *McClary v. United States*, 775 F.2d 280 (Fed. Cir. 1985) that where the CSRA provides a means of redress, the employee lacks access to the Claims Court. 783 F.2d at 1021. However, the court also noted that the present case involved an employee with no right of redress under the CSRA and that the issue of whether Claims Court jurisdiction exists where CSRA appeal routes are absent was reserved in *McClary*. *Id.*, citing *McClary* at 282. The court then noted that prior to the CSRA, an employee in Fausto's circumstances could have maintained a suit in the Court of Claims for back pay alleging violation of agency regulations. 783 F.2d at 1021-22.[3] Noting the Government's argument that the CSRA repealed historic Tucker Act jurisdiction over Federal civilian employee suits, the Federal Circuit cited the canon of statutory construction that repeals by implication are disfavored. 783 F.2d at 1022, citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133 (1974). The court found no indication that the CSRA was intended to repeal Tucker Act jurisdiction over actions traditionally within the scope of the Tucker Act and outside coverage of the CSRA. In particular, the court noted that Fausto invoked a right grounded in a regulation of an executive department, as required by the Tucker Act, and that a money-mandating pay statute (i.e., the Back Pay Act, 5 U.S.C. 5596)

[3] Contrary to the implication in the Government's brief at 5, the court of appeals did not make a generalized holding that excepted service employees had a general right to judicial review of personnel decisions. Instead, the court only recognized that judicial review was available under the Tucker Act for an excepted service employee seeking back pay where agency regulations were allegedly violated. 783 F.2d at 1021-22.

existed for employees like Fausto. The court accordingly concluded that Fausto's claims met the requirements for Tucker Act jurisdiction and that judicial review was not precluded by the CSRA. 783 F.2d at 1022-23. On the merits, the court held that Fausto was not entitled to back pay for the period following the closing of the facility where Fausto worked but, consistent with Court of Claims precedent, the court found Fausto entitled to back pay for the period covered by the suspension. 783 F.2d at 1023-24.

4. While the Government's suggestion *en banc* was declined, the same panel of the court of appeals treated the Government's suggestion as a petition for rehearing and again rejected the Government's assertion that the CSRA, by implication, prevented Tucker Act jurisdiction from being exercised in Fausto's case. The court found *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984) and *United States v. Erika, Inc.*, 456 U.S. 201 (1982), cited in the Government's suggestion, to be inapposite. Judicial review was found absent in both *Block* and *Erika* because the very statute asserted to provide the substantive right was instead interpreted to prohibit judicial review of its own provisions. The Federal Circuit noted that neither case involved whether the relevant statute repealed a substantive right in a different statute and recognized that Fausto's cause of action was not based on the CSRA. 791 F.2d at 1557-58. The court also rejected the Government's reliance on *Bush v. Lucas*, 462 U.S. 367 (1983), by noting that while *Bush* was concerned with whether the CSRA should be augmented by a new judicial remedy, Fausto's case was concerned with whether the CSRA precluded a previously existing right of judicial review under the Tucker Act and Back Pay Act. 791 F.2d at 1558-59. Similarly, the Federal Circuit rejected the Government's reliance on *United States v. Connolly*, 716 F.2d 882 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1065 (1984), by noting that *Connolly* was con-

cerned with a suit alleging a private right of action under the CSRA and not with whether the CSRA had implicitly repealed Fausto's right to challenge his employing agency's violation of regulation by invoking Tucker Act jurisdiction. 791 F.2d at 1559-60. The Federal Circuit also found that other cases cited by the Government involved employees subject to the adverse action provisions of the CSRA who were seeking additional remedies while Fausto, as an excepted service employee, was not subject to CSRA adverse action procedures. 791 F.2d at 1560.

On October 10, 1986, the Government filed a petition for certiorari with this court. The petition was granted on January 12, 1987.

SUMMARY OF THE ARGUMENT

Prior to the enactment of the Civil Service Reform Act of 1978 (CSRA), a Federal employee in an excepted service position without preference eligible status had no generalized right to judicial review of his or her removal from Federal service. However, in those cases where such an employee could allege that a termination was taken in violation of agency regulation, Tucker Act jurisdiction was available. This access to judicial review is plainly evident from the language of the Tucker Act itself. Specifically, the Tucker Act authorizes *inter alia* "any claim against the United States" founded upon "any Act of Congress or any regulation of an executive department." The CSRA did not make any change in the language of the Tucker Act and the just-cited language has remained through subsequent Tucker Act amendments.

In this case, Fausto clearly met the criteria of the Tucker Act by alleging that agency regulations were violated in his removal and in citing the Back Pay Act as authorizing a money recovery. Notwithstanding the clear statutory language, the Government argues that the CSRA

repealed authorization for Fausto's suit by implication. However, the CSRA does not cover the removals of non-veteran excepted service employees such as Fausto. Furthermore, this Court has made it clear that repeals by implication are disfavored. Nor is there any expression in the CSRA's legislative history that previously existing Tucker Act jurisdiction was to be restricted by the CSRA. There is also no expression in the CSRA or its legislative history that violations of agency regulations were to go without remedy. To suggest that the CSRA precludes suits alleging violations of agency regulations wrongly suggests that Congress intended agencies to violate their own regulations without means of redress.

Furthermore, the CSRA continued the access to judicial review by those individuals who had access prior to the CSRA. Where judicial review by such individuals is discussed at all in the CSRA, it is merely to substitute direct appellate review for district court jurisdiction. There was no need to specify Tucker Act jurisdiction in the CSRA since Tucker Act jurisdiction continued unchanged. Thus, the CSRA structure does not reflect a Congressional desire to eliminate the already existing Tucker Act jurisdiction.

Finally, there are other areas of Federal personnel law that were not even substantively addressed by the CSRA. Suits seeking additional pay have been traditionally subject to Tucker Act jurisdiction and, in light of the continuation of these rights without change by the CSRA, pay claims by Federal workers have continued to be adjudicated under Tucker Act jurisdiction. Similarly, the CSRA did not substantively change the grade classification laws for Federal workers, and one court of appeals has found court jurisdiction to continue over suits under the grade classification laws. The absence of change in these areas by the CSRA and the continuation of court review indicates that the CSRA's structure does not preclude court jurisdiction in those areas, such as the ter-

mination in the present case, which are unaffected by the CSRA. Moreover, in view of the difference between the narrow circumstances of Fausto's removal and the broad areas of Federal personnel law, such as compensation, which are unaffected by the CSRA, care must be taken to avoid an incorrect assumption of a generalized preclusion of court jurisdiction by the CSRA.

ARGUMENT

A. The CSRA Does Not Preclude Tucker Act Jurisdiction Over A Suit By A Nonveteran Excepted Service Employee Alleging Violation Of Agency Regulations

1. In examining the question of whether the CSRA precludes Fausto's suit in this case, it is important to note the nature of Fausto's suit. Under agency regulations, Fausto was entitled to a formal hearing before a grievance examiner. Yet Fausto never was permitted such a formal hearing either at the time of his removal or at the time, one year following his removal, that the agency finally permitted Fausto access to the agency's regulatory grievance procedure. At no time in the Government's brief does the Government ever dispute that agency regulations were violated in that Fausto was denied his right to a formal hearing before a grievance examiner. Under the Tucker Act, 28 U.S.C. 1491, "[t]he United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. 1491(a)(1). Fausto's suit against the Government alleged that a regulation of an executive department was violated. At the same time, for Fausto to invoke Tucker Act jurisdiction, he must have a right to money damages sufficient to raise a "claim." Under the Back Pay Act, 5 U.S.C. 5596,

money recovery is authorized against the United States where an employee is found "to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances or differentials of the employee." 5 U.S.C. 5596(b). *See United States v. Testan*, 424 U.S. 392, 405 (1976). Here Fausto's suit alleged that the agency's violation of its own regulations in Fausto's removal resulted in an unwarranted or unjustified personnel action resulting in a loss of pay for Fausto. As noted by the court of appeals, "Fausto does invoke a right grounded in a regulation of an executive department as required by the Tucker Act and a money-mandating pay statute does exist for Department of the Interior employees like Fausto." 783 F.2d at 1022. The court therefore concluded that Fausto's claim fell within the terms of the Tucker Act. *Id.*

In this case it is clear that Fausto's case does not arise under the CSRA. Indeed, removals for misconduct of nonpreference eligible (*i.e.*, nonveteran) employees holding excepted service positions are not addressed by the CSRA. 5 U.S.C. 7511(a). Thus, it is evident that nonveteran excepted service employees do not have appeal rights arising out of the CSRA. But Fausto was seeking to enforce his rights under the agency's regulations rather than any CSRA rights. The question then becomes whether the CSRA repealed a clear right of Mr. Fausto to invoke Tucker Act jurisdiction to enforce non-CSRA agency regulations.

Prior to enactment of the CSRA, a nonveteran excepted service employee could be summarily removed in the absence of regulatory violation. *Batchelor v. United States*, 169 Ct. Cl. 180, 183-84, *cert. denied*, 382 U.S. 870 (1965). At the same time, an employee, including a nonveteran excepted service employee, whose rights under agency regulations were abridged could still challenge the violation of agency regulations in court under Tucker Act

jurisdiction even where the employee was otherwise subject to summary removal. *Batchelor*, *supra* at 184; *Greenway v. United States*, 163 Ct. Cl. 72, 76 (1963). This Court has similarly noted that once an agency promulgates regulations in the area of employee removal, the agency has to follow such regulations even if the employee could be summarily fired in the absence of such regulations. *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959).

While the Government's brief devotes great effort to the structure of the CSRA in support of its position that Fausto is without a right of judicial review, nothing offered by the Government even suggests elimination of Tucker Act jurisdiction over claims by nonveteran excepted service employees that agency regulations have been violated. The CSRA language and its legislative history completely lack any expression of intent to repeal Tucker Act jurisdiction in areas not addressed by the CSRA. Not only did Congress fail to suggest any amendment of Tucker Act jurisdiction in the CSRA, but nowhere in the "Technical and Conforming Amendments" to the CSRA (Pub. L. No. 95-454, §§ 703 and 906, 92 Stat. 1216 and 1224 (1978)) did Congress make any change in the Tucker Act to conform the Tucker Act to the CSRA. See 1978 U.S. Code Cong. & Admin News (92 Stat.) 1216 and 1224.

Nor is there any expression of intent in the CSRA or its legislative history that agency regulations which are unrelated to CSRA provisions were to become unenforceable. There is a strong presumption favoring judicial review of administrative action. *Bowen v. Michigan Academy of Family Physicians*, —— U.S. ——, 106 S. Ct. 2133, 2135 (1986). In examining an individual's entitlement to judicial review of an agency action, access to judicial review is restricted only upon a showing of "clear and convincing evidence." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). For the "clear and convincing evidence" standard to be overcome, the congressional intent to preclude judicial review must be fairly discernible in the statutory scheme. *Block v. Community Nutrition Institute*, 467 U.S. 340, 351 (1984), citing *Data Processing Service v. Camp*, 397 U.S. 150, 157 (1970). As the Government cannot point to any language in the CSRA which authorizes rescission of the Federal worker's right to invoke Tucker Act jurisdiction, the Government's brief therefore suggests that such a right was repealed by implication by the CSRA. Yet repeals by implication are not favored. *Rodriguez v. United States*, —— U.S. ——, 107 S. Ct. 1391, 1392 (1987); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133 (1974). Where the assertion is made that the structure of a statute implicitly precludes a suit not based upon that statute, the "clear and convincing evidence" standard is a "useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." *Block*, *supra*, 467 U.S. at 351. Here the clear and convincing evidence to deny an employee the ability to enforce agency regulations through the courts cannot be found in the CSRA.

2. To extend the preclusion analysis by the Government to Fausto's case runs contrary to the traditional access of individuals to Federal courts to enforce agency regulations. It has been the longstanding principle for the courts to be a forum for correcting violations of agency regulations. *Service v. Dulles*, 354 U.S. 363 (1957); *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959). This principle is reflected in the Tucker Act's authorization for Claims Court jurisdiction for any claim founded upon "any regulation of an executive department." 28 U.S.C. § 1491(a)(1). The logical and foreseeable result of the Government's position is that a nonveteran excepted service employee may have protections under agency regulations, but that an agency may be free to

violate its own regulations with the knowledge that the employee lacks any recourse. As noted *supra*, the nonveteran excepted service employee is not covered by the CSRA provisions governing discipline. Nothing in the CSRA or its legislative history suggests that an employee is to be without remedy for violations of agency regulations. Similarly, nothing in the CSRA or its legislative history expresses a Congressional desire to end the traditional right of employees to enforce agency regulations through the courts. The Government's brief simply fails to show that for nonveteran excepted service workers, the traditional judicial access for the enforcement of agency regulations was terminated by the CSRA.

3. For the Government's position that the CSRA restricted Fausto's access to Tucker Act jurisdiction by implication to be correct, it would follow that the CSRA discontinued previously existing avenues of judicial review for adversely affected employees. Yet while the CSRA reformulated the forums in which these employees could pursue a personnel action, the CSRA continued the availability of judicial review for those employees who had access to the courts prior to the enactment of the CSRA.

Under the CSRA, a competitive service employee or an employee in the excepted service with preference eligible status [5 U.S.C. 7511(a)(1)] may not be removed except "for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a). Should an employee, as defined in 5 U.S.C. 7511(a)(1), believe that his or her removal is not for such cause as will promote the efficiency of the service, that employee has an appeal right to either the Merit Systems Protection Board (MSPB) or, where applicable, through a grievance procedure negotiated between the employee's agency and the labor union certified as the representative for the employee. 5 U.S.C. 7513 (d) and 7121(e). If the employee remains unvindicated by the MSPB or by a labor arbitrator, the em-

ployee may file a petition for review of the adverse decision with the Federal Circuit. 5 U.S.C. 7703 and 7121(f).[4]

Yet while competitive service employees and preference eligibles (veterans) have the right to seek judicial review of disciplinary actions under the CSRA, judicial review of disciplinary actions was also available for those employees prior to the enactment of the CSRA. At that time, 5 U.S.C. 7501(a) (1976) prohibited removal of a competitive service employee except for such cause as promoted the efficiency of the service. Similarly, a preference eligible prior to the CSRA could not be removed except for such cause as promoted the efficiency of the service. 5 U.S.C. 7512(a) (1976). Judicial review was available in either district courts or the Court of Claims for competitive service and preference eligible employees to challenge removals. *E.g. Brousseau v. United States*, 640 F.2d 1235, 1246 (Ct. Cl. 1981); *Young v. Hampton*, 568 F.2d 1253, 1258 (7th Cir. 1977); *Polcover v. Secretary of the Treasury*, 477 F.2d 1223, 1228 (D.C. Cir.), *cert. denied*, 414 U.S. 1001 (1973). While the CSRA only provides judicial review at the appellate court level, there was no *de novo* review at the lower court level in review of pre-CSRA cases. *Polcover*, *supra*, 477 F.2d at 1226; *Pascal v. United States*, 543 F.2d 1284, 1287 n.3 (Ct. Cl. 1976).

As noted in the Government's brief at pages 16-17, the CSRA established a new Chapter 43, 5 U.S.C. covering performance evaluation. As with matters of employee misconduct, the CSRA provides preference eligible and competitive service employees with the right to appeal

---

[4] Originally, the CSRA provided for judicial review of adverse action decisions in either the Court of Claims or in a United States court of appeals. Pub. L. 95-454, § 205, 92 Stat. 1143 (1978). As a result of the Federal Courts Improvement Act of 1982, Pub. L. 97-164, § 127(a), 96 Stat. 37, jurisdiction over such actions now lies in the Federal Circuit. 5 U.S.C. 7703(b).

performance-based removals to the MSPB or under a negotiated grievance procedure [5 U.S.C. 4303(e) and 7121 (e)] and with the right of judicial review if the decision is adverse to the employee. Yet prior to the enactment of the CSRA, employees facing performance-based removals were provided access to judicial review in the same manner as employees facing pre-CSRA misconduct removals. Performance-based removals prior to the CSRA's enactment were covered by the "efficiency of the service" provisions in 5 U.S.C. Chapter 75 (1976). *Lovshin v. Department of the Navy*, 767 F.2d 826, 830 (Fed. Cir. 1985), *cert. denied*, —— U.S. ——, 106 S. Ct. 1523 (1986). Therefore, removals based upon unacceptable performance prior to the CSRA were judicially reviewable in the same manner and under the same conditions as misconduct removals. *See Boyle v. United States*, 515 F.2d 1397, 1400 (Ct. Cl. 1975).

In view of the system of judicial review prior to enactment of the CSRA, it is evident that in the CSRA, Congress intended the continued availability of judicial review for those that had access prior to the CSRA. Thus, while Congress simplified the judicial review availability by providing for direct appellate review [*see* S. Rep. 95-969, 95th Cong., 2d Sess. 63 (1978)], Congress maintained judicial review access for those employees who had access to judicial review in the period preceding the CSRA's enactment. Thus, contrary to the Government's theory that the CSRA structure precludes judicial review of non-CSRA causes of action, the structure of the CSRA was a continuation of access to judicial review by employees with pre-CSRA access. In the areas of employee misconduct covered by 5 U.S.C. Chapter 75 and unacceptable performance under 5 U.S.C. Chapter 43, it was necessary for Congress to spell out the rights for judicial review in the CSRA because new avenues of judicial review were being created. However, there was no need for Congress to expressly address Tucker Act jurisdiction by the then-Court of Claims in the CSRA, as Congress

intended no change in Tucker Act jurisdiction. There was no amendment of 28 U.S.C. 1491 in the CSRA. Furthermore, both the version of 28 U.S.C. 1491 at the time of the CSRA and the current 28 U.S.C. 1491(a)(1) confers jurisdiction over "any claim against the United States" founded upon "any Act of Congress or any regulation of an executive department." *Compare* 28 U.S.C. 1491 (1976) and 28 U.S.C. 1491(a)(1) (1982).[5] It was this language in the Tucker Act that was relied upon by the Federal Circuit in concluding that Tucker Act jurisdiction existed over Fausto's claim. 783 F.2d at 1022-23. It is appropriate to assume that Congress knew of the existing Tucker Act jurisdiction at the time of the CSRA and, in light of its silence, legislated with existing law in mind. *Albernaz v. United States*, 450 U.S. 333, 341-42 (1981). The structure of the CSRA, contrary to the Government's position, therefore reflects a continuation of Tucker Act jurisdiction for the enforcement of agency regulations by excepted service employees in Fausto's circumstances.

4. While the government argues that permitting Fausto to pursue his action in the Claims Court would be anomalous in that nonprobationary competitive service employees and veterans must utilize the MSPB to challenge their removals (Gov't. brief at 34-36), the Government's argument fails to take into account the narrow basis upon which Fausto is able to invoke Tucker Act jurisdiction. Even in the pre-CSRA period, nonveteran excepted service employees and probationary employees did not have a generalized right to challenge their removals under the Tucker Act. *Greenway v. United States*, 163 Ct. Cl. 72, 75 (1963); *Batchelor v. United States*,

---

[5] Since the CSRA, 28 U.S.C. 1491 has undergone a number of minor amendments. The most material of these amendments occurred under the Federal Courts Improvement Act of 1982, Pub. L. 97-164, § 133(a), 96 Stat. 39, where the Claims Court was substituted for the Court of Claims and where the previous language was divided into subsections.

169 Ct. Cl. 180, 183, *cert. denied*, 382 U.S. 870 (1965). Yet Tucker Act jurisdiction nonetheless existed for cases where violation of agency regulations was alleged. *Greenway, supra*, 163 Ct. Cl. at 76; *Batchelor, supra*, 169 Ct. Cl. at 183-84. Thus, contrary to the Government's implication, affirmance of the Federal Circuit's decision would not result in a floodgate of cases by nonveteran excepted service employees. Rather, affirmance of the lower decision would, consistent with the plain language of the Tucker Act, continue the availability of judicial review for that small category of cases where compliance with agency regulations is at issue. Nor does Tucker Act jurisdiction create a hardship on the agency since the agency has affirmatively chosen to create the rights at issue by regulation. Indeed, denying individuals in Fausto's circumstance of continued Tucker Act jurisdiction would create the anomalous situation of an individual having specific rights under agency regulation but having no means of enforcing that right should the agency choose to disregard its own regulation.

5. None of the cases relied upon by the Government demonstrate the removal of preexisting Tucker Act jurisdiction by the CSRA over suits, such as Fausto's, alleging rights not founded upon the CSRA. In *Veit v. Heckler*, 746 F.2d 508 (9th Cir. 1984) (Gov't. brief at 24-25), the Ninth Circuit held that court jurisdiction was absent over a suit challenging a performance rating which was issued pursuant to the CSRA provisions on performance appraisal. In so holding, the court noted that "federal courts have no power to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the CSRA *or elsewhere*." 746 F.2d at 511 (emphasis added).[6] Similarly, in *McClary v.*

[6] Later the Ninth Circuit recognized that a suit by a Federal worker alleging violation of non-CSRA rights was subject to court jurisdiction. *Burroughs v. Office of Personnel Management*, 764 F.2d 1300 (9th Cir. 1985).

United States, 775 F.2d 280 (Fed. Cir. 1985) (Gov't. brief at 27) a suit was precluded because the right asserted was subject to the CSRA and appealable to the MSPB. 775 F.2d at 282. By contrast, Fausto's suit was based on a right not grounded in the CSRA, a critical distinction recognized by the court of appeals in this case. 783 F.2d at 1022-23.

The employee in *Pinar v. Dole*, 747 F.2d 899 (4th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985) (Gov't. brief at 25-26) also tried to appeal minor personnel actions covered by the CSRA (747 F.2d at 902) pursuant to the Administrative Procedure Act (APA). 747 F.2d at 912-13. Similarly, *Carducci v. Regan*, 714 F.2d 171 (D.C. Cir. 1983) (Gov't. brief at 26, 34) involved a suit on matters covered by the CSRA pursuant to the APA.[7] In *Harrison v. Bowen*, 815 F.2d 1505 (D.C. Cir. 1987) (Gov't. brief at 26, 31-33), a suit was based in part on violation of agency regulation. Yet the court found a lack of jurisdiction because the agency regulation was itself issued pursuant to the CSRA. 815 F.2d at 1517-18. By contrast, Fausto's suit is not based on a regulation issued pursuant to the CSRA and is specifically authorized by language in the Tucker Act and Back Pay Act.

Further, none of the cases cited by the Government recognized those matters discussed in this brief which illustrates that the CSRA's structure does not preclude judicial review over cases such as Fausto's. None of the cases noted the absence of expression in the CSRA to restrict existing court jurisdiction. Nor did these cases indicate that where judicial review was discussed in the

[7] In *Carducci*, the court held that a regulatory violation alleged by the employee could have been pursued by filing an allegation of prohibited personnel practice with the Office of Special Counsel. 714 F.2d at 175. The Government makes no such contention in this case.

CSRA, it was to continue an employee's preexisting judicial review access under different procedures. Additionally, none of the cases addressed the continued availability of judicial review for areas of Federal personnel law, such as compensation, which continued unchanged by the CSRA (see B., *infra*). In short, the case law cited by the Government does not demonstrate the inability of an employee such as Fausto to rectify violation of non-CSRA provisions by invoking Tucker Act jurisdiction.

6. In short, Fausto's suit in this case alleged violation of agency regulation and a money-mandating statute (the Back Pay Act) authorizes a monetary recovery. Therefore, Fausto's suit falls within the plain language of the Tucker Act. The CSRA and its legislative history at no time expressed a desire to limit or restrict traditional Tucker Act jurisdiction and, in the narrow circumstance of a personnel action taken in violation of agency regulation, Tucker Act jurisdiction has been traditionally available. While the Government argues that the CSRA structure repealed the right of action Fausto would have clearly had prior to the CSRA, the structure of the CSRA indicates a continuation of judicial review for those individuals who had access to judicial review. While specifiicity was provided in the CSRA as to the procedures of judicial review for Chapter 43 and 75 actions, this was done because Congress simplified the appeal route available under judicial review. There was no need for such specificity to continue jurisdiction available under the Tucker Act since Congress made no effort whatsoever to amend or restrict Tucker Act jurisdiction. Ther fore, the CSRA has not precluded a suit invoking Tucker Act jurisdiction by a nonveteran employee in the excepted service seeking to overturn a removal action accomplished in violation of agency regulation.

B. The Government's Theory That Tucker Act Jurisdiction Is Precluded By The CSRA Ignores Those Areas Of Federal Personnel Law That Were Unaffected By The CSRA And Remain Subject To Judicial Review

In addressing the CSRA's coverage of Federal personnel actions, the Government has ignored one key point in the CSRA's structure. That point is that despite its extensiveness, the CSRA simply does not address all aspects of the Federal employer-employee relationship. Earlier in this argument, it was shown that the CSRA did not amend the provision of the Tucker Act which authorized suits by nonveteran employees in the excepted service alleging that personnel actions were taken in violation of agency regulation. Other provisions conferring rights, such as compensation, leave and travel expenses, upon Federal workers predate the CSRA and were procedurally and substantively unaffected by the CSRA. The Government's argument, if taken to its logical extreme, would lead to the conclusion that the CSRA precluded all preexisting avenues of judicial review. Such a conclusion is absurd. The existence of Federal employee rights outside CSRA coverage refutes the Government's theory that the CSRA precluded preexisting judicial review avenues. At the same time, the existence of substantive areas outside the CSRA besides Fausto's unique circumstances must prompt caution in overstating the scope to which the CSRA may have precluded previously existing avenues of judicial review.

One area in which rights of most Federal employees were unaffected by enactment of the CSRA was pay. For example, the pay rates and systems for General Schedule (GS) and prevailing rate [blue collar or Wage Grade (WG)] employees can be found in Title 5, United States Code, Chapter 53. Provisions providing for overtime and for numerous types of differential pay for most Federal workers can be found in Title 5, United States Code, Chapter 55, Subchapter V (5 U.S.C. 5541 *et seq.*). Provisions pertaining to travel, transportation and subsis-

tence allowances and expenses may be found in Title 5, Chapter 57. Other types of allowances are authorized by Title 5, Chapter 59. Conditions governing entitlement to annual leave, sick leave or other leave are set forth in Title 5, Chapter 63. Additionally, Federal employees are protected by the Fair Labor Standards Act. 29 U.S.C. 203(e)(2). Except for provisions not applicable to most Federal workers,[8] the CSRA neither created nor rescinded substantive rights under these provisions. In fact, the only general change to these provisions in the CSRA was substitution of the "Office of Personnel Management" for the predecessor "Civil Service Commission." Pub. L. 95-454, § 906(a)(2), (3), (8) and (12), 92 Stat. 1224 (1978).

Suits by Federal workers arising prior to the effective date of the CSRA and alleging agency noncompliance with statutory pay provisions or implementing pay regulations were traditionally subject to Tucker Act jurisdiction. *E.g. Sullivan v. United States*, 665 F.2d 1012 (Ct. Cl. 1981) (suit seeking overtime pay under provisions in Title 5, Chapter 55); *Bendure v. United States*, 554 F.2d 427 (Ct. Cl. 1977) [suit seeking environmental differential pay under regulations issued pursuant to 5 U.S.C. 5343(c)(4)]; *Sam v. United States*, 682 F.2d 925, 935 (Ct. Cl. 1982) [suit based on 5 U.S.C. 5333(b) and 5334(a)]. Given that the CSRA has made no substantive or procedural change in these statutory pay provisions, Tucker Act jurisdiction has been continuously exercised

[8] Under the CSRA, a new Chapter 53, Subchapter VI (5 U.S.C. 5361 *et seq.*) was created authorizing grade and pay retention for employees placed in lower graded positions as a result of reduction in force. Pub. L. 95-454, § 801, 92 Stat. 1218 (1978). The CSRA also established a Senior Executive Service for upper level career management. Pub. L. 95-454, Title IV, 92 Stat. 1154 (1978). As part of the statutory provisions governing this new service, Subchapter VIII was added to Title 5, United States Code, Chapter 53, to cover pay for the Senior Executive Service. Pub. L. 95-454, § 407, 92 Stat. 1171 (1978).

without challenge over suits by Federal workers enforcing these pay provisions. *E.g. National Maritime Union v. United States*, 682 F.2d 944 (Ct. Cl. 1982) (suit seeking compensation under 5 U.S.C. 5348); *O'Neall v. United States*, 797 F.2d 1576 (Fed Cir. 1986) [suit for environmental differential pay under regulation pursuant to 5 U.S.C. 5343(c)(4)]; *Sanford v. Weinberger*, 752 F.2d 636 (Fed. Cir. 1985) (suit under 5 U.S.C. 5542(a) and Fair Labor Standards Act); *Kester v. Horner*, 778 F.2d 1565 (Fed. Cir. 1985) (suit for cost of living adjustment under 5 U.S.C. 5941).[9] Thus, judicial enforcement of the many pay provisions has remained under the Tucker Act without any impact by the CSRA.

Similarly, the provisions in Title 5, United States Code, Chapter 51 governing classification of GS positions were substantively unchanged for most covered Federal workers by passage of the CSRA.[10] At least one court of appeals has recognized the continuation of court jurisdiction over classification matters not covered by the CSRA. In *Burroughs v. Office of Personnel Management*, 764 F.2d 1300 (9th Cir. 1985), a Federal employee sought to have his job as a flight test pilot reclassified to a higher grade. 764 F.2d at 1301. The Government contended in *Bur-*

[9] *O'Neall*, *Sanford* and *Kester* were all originally brought in United States district court under the provision in the Tucker Act currently found in 28 U.S.C. 1346(a)(2) which grants district courts concurrent jurisdiction with the Claims Court over claims against the United States not in excess of $10,000. Exclusive jurisdiction over any appeal of a district court final decision where the district court's jurisdiction was based on 28 U.S.C. 1346(a)(2) rests in the Federal Circuit. 28 U.S.C. 1295(a)(2).

[10] As with statutory pay provisions, the Office of Personnel Management was substituted for the Civil Service Commission throughout Chapter 51. Pub. L. 95-454, § 906(a)(2), (3) and (17), 92 Stat. 1224 (1978). Additionally, the CSRA amended provisions concerning higher graded career management officials to comport with the newly created Senior Executive Service. Pub. L. 95-454, § 414(a)(1)(C) and (D), 92 Stat. 1177 (1978).

roughs that the district court lacked jurisdiction because of the CSRA. *Id.* The Ninth Circuit rejected the Government's argument, noting that the CSRA "does not apply to employees' requests for job reclassifications, which are provided for under 5 U.S.C. § 5112." 764 F.2d at 1302. Thus, the court in *Burroughs*, as the Federal Circuit did in this case, found that where the CSRA did not cover aspects of Federal employment, the CSRA did not preclude judicial review.[11]

When the entire statutory structure of Federal employment is thus examined, it becomes evident that there are a number of areas in which rights have predated the CSRA and are unaffected by the CSRA. The total absence of expression in the CSRA that judicial review was precluded for these traditional rights, such as compensation, suggests that Congress intended no change in judicial review of areas unaddressed by the CSRA.

At the same time, Fausto's right, as a nonveteran excepted service employee, to challenge a removal in vio-

[11] *Burroughs* is thus distinguishable from *Barnhart v. Devine*, 771 F.2d 1515 (D.C. Cir. 1985) where it was held that district court jurisdiction over a suit seeking position-to-position comparisons was preempted by the CSRA in that a failure to perform position-to-position comparisons was held to be a prohibited personnel practice within the investigative powers of the Office of Special Counsel. In *Burroughs*, the court specifically found that a request for job reclassification was not within the coverage of a prohibited personnel practice. 764 F.2d at 1302. If a conflict is to be read between *Burroughs* and *Barnhart*, AFGE submits that the absence of any amendment by the CSRA of the classification provisions of Title 5, United States Code compels a finding that the CSRA does not preclude judicial review over violations of those non-CSRA provisions. Contrary to *Barnhart*, a classification decision cannot even be the subject of a prohibited personnel practice finding since a classification decision is not one of the defined actions covered by the prohibited personnel practice provisions. 5 U.S.C. 2302(a)(2). Most importantly, *Barnhart* does nothing to refute the fundamental point that in those employment areas, such as pay, where the CSRA has no impact upon enforcement mechanisms, judicial review remains available notwithstanding the CSRA.

lation of agency regulation is far removed from the compensation rights for thousands of Federal workers that have been the traditional basis for Tucker Act jurisdiction. It is unnecessary to determine the right of a nonveteran excepted service employee to challenge his removal by means of a sweeping generalization that may be wrongly applied in areas not at issue in this case. Fausto's unique circumstances do not provide a suitable basis for broad preclusion of court jurisdiction over Federal personnel rights unaffected by the CSRA and traditionally subject to court jurisdiction.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

MARK D. ROTH *
General Counsel
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
80 F Street, N.W.
Washington, D.C. 20001
(202) 639-6424

KEVIN M. GRILE
Staff Counsel
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
446 North Central Avenue
Northfield, Illinois 60093
(312) 446-9486

* Counsel of Record

July, 1987

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
JUL 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-595

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

UNITED STATES OF AMERICA,
Petitioner
v.
JOSEPH A. FAUSTO

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF OF JOSEPH D. FINN, KENNETH R. BOYD, G. L. BRYANT, HEINZ J. SANDER, DAVID L. BROCK, JULIAN W. CHENEY, ELMORE JACKSON AND DEVERE W. TYLER AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

IRVING KATOR
Counsel of Record
JOSEPH B. SCOTT
MICHAEL J. KATOR
KATOR, SCOTT & HELLER, CHTD.
1029 Vermont Avenue, N.W.
Ninth Floor
Washington, D.C. 20005
(202) 393-3800
Attroneys for *Amici Curiae*

July 10, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether Congress intended with its enactment of the Civil Srvice Reform Act of 1978 silently to extinguish federal employees preexisting rights to seek judicial review of personnel actions not covered by the Reform Act.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. There Is No "Clear and Convincing" Evidence Of A Congressional Intent To Preclude Judicial Review	5
II. The Consequence of The Government's Argument Would Be To Preclude Review In Areas Untounched By The Reform Act	13
CONCLUSION	18

TABLE OF AUTHORITIES

Cases: Page

Abbott Laboratories v. *Gardner*, 387 U.S. 134 (1967) 5
American Tobacco Co. v. *Patterson*, 456 U.S. 68 (1982) 6
Barnhart v. *Devine*, 771 F.2d 1515 (D.C. Cir. 1985) 15
Block v. *Community Nutrition Institute*, 467 U.S. 340 (1984) 5, 7, 10
Bowen v. *Michigan Academy of Family Physicians*, 106 S.Ct. 2133 (1966) 7, 11
Brown v. *General Services Admin.*, 425 U.S. 820 (1976) 10
Cleveland Board of Education v. *Loudermill*, 470 U.S. 532 (1985) 11
Commodity Futures Trading Comm'n v. *Schor*, 106 S.Ct. 3245 (1986) 12
Crowell v. *Benson*, 285 U.S. 22 (1932) 12
Finn v. *OPM*, Civil Action #2:84-2320-1 (D.S.C.), December 31, 1986 16
Haneke v. *Secretary, HEW*, 535 F.2d 1291 (D.C. Cir. 1975) 14
Harrison v. *Bowen*, 815 F.2d 1505 (D.C. Cir. 1987) 11
Lindahl v. *Office of Personnel Management*, 470 U.S. 768 (1985) 5, 7, 8, 10
Machinists v. *Street*, 367 U.S. 740 (1961) 11
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 11
Merrill Lynch, Pierce, Fenner & Smith v. *Curran*, 456 U.S. 353 (1982) 7
Nederstek v. *Adams*, 449 F.Supp. 286 (D.D.C. 1978) 14
Polcover v. *Department of Treasury*, 477 F.2d 1223 (D.C. Cir.), *cert. denied*, 441 U.S. 1001 (1973) 9
Rodriguez v. *United States*, 107 S.Ct. 1391 (1987) 10
Semaan v. *Mumford*, 335 F.2d 704 (D.C. Cir. 1964) 12
Small v. *Inhabitants of City of Belfast*, 796 F.2d 544 (1st Cir. 1986) 11

TABLE OF AUTHORITIES—Continued

Page

Thomas v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985) 12
Todd v. *Campbell*, 446 F.Supp. 149 (D.D.C. 1978) 14
United States v. *Clark*, 445 U.S. 23 (1980) 12
United States v. *Erika, Inc.*, 456 U.S. 201 (1982) 7, 8, 10
United States v. *Locke*, 471 U.S. 84 (1985) 8
United States v. *Testan*, 424 U.S. 392 (1976) 14
Ward v. *Campbell*, 610 F.2d 231 (5th Cir. 1980) 14

Statutes and Other Authorities:

5 C.F.R. § 752 (1978) 9
5 C.F.R. § 772 (1978) 9
5 U.S.C. §§ 701-706 14
5 U.S.C. § 2103(a) 3
5 U.S.C. § 2108(3) 3
5 U.S.C. §§ 2301-2105 8
5 U.S.C. §§ 3131-3135 8
5 U.S.C. §§ 3301-3305 8
5 U.S.C. §§ 3501-3504 9
5 U.S.C. §§ 4301-4315 8
5 U.S.C. §§ 5101-5104 ..... 8, 13, 14
5 U.S.C. § 5105(a) 2
5 U.S.C. § 5105(b) 2
5 U.S.C. §§ 7501-7513 9
5 U.S.C. § 7511 6
5 U.S.C. § 7511(a) 3
5 U.S.C. § 7511(b) 3
5 U.S.C. § 7513 6
5 U.S.C. §§ 7701-7703 ..... 6, 9
5 U.S.C. §§ 8301-8351 8
28 U.S.C. § 1361 14
28 U.S.C. § 1491 17
38 U.S.C. § 703(a)(2) 1
Pub. L. No. 89-554, 80 Stat. 452 (1966) 14
Pub. L. No. 95-454, 92 Stat. 1111 (1978) ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-595

UNITED STATES OF AMERICA,
Petitioner

v.

JOSEPH A. FAUSTO

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF OF JOSEPH D. FINN, KENNETH R. BOYD, G. L. BRYANT, HEINZ J. SANDER, DAVID L. BROCK, JULIAN W. CHENEY, ELMORE JACKSON AND DEVERE W. TYLER AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

Joseph D. Finn, *et al.*, submit this brief *amici curiae* to urge that the Court affirm the decision below and forestall the government's attempts to misuse the Civil Service Reform Act to immunize itself from judicial scrutiny of personnel actions not covered by the Reform Act.

INTEREST OF AMICI

Amici Joseph D. Finn, *et al.*, are members of the United States Air Force Reserves who serve as civilian employees of the United States government in Air Reserve Technician (ART) positions. *See* 38 U.S.C. § 709

(a)(2). Specifically, *amici* are officially designated as ART Aircraft Loadmaster (Instructors) and are now classified at the GS-8 level. *Amici* were at one time all stationed at Charleston Air Force Base, Charleston, South Carolina. As Loadmasters, *amici* are members of the air crews of military cargo aircraft and are responsible for the loading and off-loading of all cargo for the Military Airlift Command. As Loadmaster (Instructors), *amici* also are responsible for instructing journeymen and sub-journeymen level Loadmasters in the science of aircraft loading and off-loading (including inflight off-loading of equipment and personnel).

The position of ART Loadmaster (Instructor) was created in August, 1970. To this date, however, notwithstanding the mandate of the Classification Act of 1949,[1] neither the now defunct Civil Service Commission nor the Office of Personnel Management (OPM) has ever published a classification standard for this position. *Amici* have over the past seven years attempted to compel OPM to fulfill its statutory duty to publish a classification standard for their positions, and they have pressed their concerns not only with their employing agency and OPM, but with the Special Counsel of the Merit Systems Protection Board as well.

In 1984, *amici*, on behalf of themselves and all others similarly situated, filed a mandamus action in the United States District Court for the District of South Carolina. In that civil action, *amici* sought to compel OPM to perform its nondiscretionary duty to publish a classification

[1] 63 Stat. 957 (1949). As originally enacted in 1949, and as it exists today (with the substitution of OPM for the Civil Service Commission), the Classification Act requires that OPM "shall prepare standards for placing positions in their proper classes and grades," 5 U.S.C. § 5105(a), and that OPM "shall revise, supplement, or abolish existing standards so that, as nearly as may be practicable, positions existing at any given time will be covered by the current published standards." 5 U.S.C. § 5105(b).

standard for their positions. On December 31, 1986, the district court dismissed their complaint, holding that the Civil Service Reform Act, although silent on the question of judicial review of classification actions of OPM, nonetheless divested it of jurisdiction to hear *amici's* complaint. Appeal is pending in the Fourth Circuit.

Because the issue presented in *Fausto* so closely parallels the issue raised in *amici's* suit, and because the error of the government's strained reading of the Reform Act is readily demonstrable upon its application to actions such as *amici's*, *amici* have obtained the consent of the parties to submit a brief in support of Mr. Fausto seeking affirmance of the judgment below. For these reasons set out below, *amici* urge the Court to affirm the decision of the Federal Circuit.

SUMMARY OF ARGUMENT

The government urges this Court to reverse the decision below and hold that the Civil Service Reform Act of 1978 bars "nonpreference excepted service" employees[2] from bringing suit under the Tucker Act to seek back pay for unwarranted and unjustified personnel actions.

[2] Positions in the excepted service are, simply, "those civil service positions which are not in the competitive service or the Senior Executive Service." 5 U.S.C. § 2103(a). For purposes of Subchapter II ("Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less") of Chapter 75 ("Adverse Actions") of Title 5, unless specifically excluded because of the nature of their positions, *see* 5 U.S.C. § 7511(b), "preference eligible" employees (roughly, veterans, *see* 5 U.S.C. § 2108(3)) who hold positions in the excepted service are entitled to all the rights of competitive service employees. *See* 5 U.S.C. § 7511(a)(1)(B). Because certain preference eligible excepted service employees are not covered by Subchapter II, and because there is no accurate shorthand way to express who is covered and who is excluded by the provisions of Subchapter II of Chapter 75, we use the term "nonpreference excepted service employees" generally ot refer to employees, such as Mr. Fausto, who are excluded from the coverage of Subchapter II.

The government argues that with its enactment of the Reform Act, Congress intended to preclude nonpreference excepted employees from pursuing their established right to bring such actions. The government points to no explicit statutory language from which such an intent could be inferred, and it points to no legislative history which presumably would reveal such an intent. Rather, the government bases its argument on an attenuated parsing of the complex statutory provisions and penumbral intimiations from which it gleans this Congressional purpose.

The government's argument fails for two reasons. First, it is now, as it was in 1978, axiomatic that courts will not construe a statute to preclude judicial review absent a clear and convincing expression of congressional intent. Congress has on many occasions demonstrated that it is capable of drafting language to preclude judicial review, and no such language is to be found in the Reform Act. Though one must step cautiously beyond the plain language of the statute, it might be easier to accept the government's argument that this failure was simply an oversight on Congress' part, if there were any legislative history to suggest this was so. There is none. Thus the government's argument devolves to a plea that this Court, on the basis of some vague notion of the "policy" of the Reform Act, step in where Congress chose to stay out and engraft a preclusion of review section onto the Reform Act. Indeed, the government in effect asks this Court to provide a new section to the Act, one which repeals preexisting causes of action anchored in statutes that are not even mentioned in the Reform Act. The government's arguments, are, of course, not properly addressed to this body. Rather, if the government wants the policy underlying its argument adopted, it must direct its plea to Congress.

Moreover, adoption of the government's argument would raise serious constitutional questions. This Court

has long eschewed interpretations of statutes that raise such difficulties, and thus, since the government's "interpretation" of the Reform Act is not unambiguously mandated, for this reason as well, it must be rejected.

Finally, not only is the government's position untenable as a matter of statutory construction, but it fails as well because carried to its logical end, the government's argument would preclude judicial review in other areas which traditionally have been subject to judicial scrutiny. The government's argument is that no judicial review of any federal personnel matter is available unless specifically provided for in the Reform Act. For example, the government's argument would preclude courts from entertaining actions seeking to enforce the mandate on the Classification Act of 1949, even though Congress did not even discuss amendment of the Classification Act in its consideration of the Reform Act. It seems unlikely in the extreme that Congress, without a word, would have intended to have so circumscribed federal employees' rights in the classification area as well as several other areas of federal personnel management not affected by the Reform Act.

ARGUMENT

I. There Is No "Clear And Convincing" Evidence Of A Congressional Intent To Preclude Judicial Review

This Court repeatedly has held that a statute will not be construed to bar access to judicial review unless Congress clearly and convincingly manifests such an intent. *Lindahl* v. *Office of Personnel Management*, 470 U.S. 768, 778 (1985), *quoting Abbott Laboratories* v. *Gardner*, 387 U.S. 134, 141 (1967). While such a purpose need not be established in the strict evidentiary sense, nonetheless it must be "fairly discernible" in either the statute's "express language, . . . the structure of the statutory scheme, its objectives, its legislative history, [or] the nature of the administrative action involved." *Block* v. *Community*

Nutrition Institute, 467 U.S. 340, 345 (1984). As the court below correctly observed, no congressional intent to preclude excepted service employees from seeking redress under the Tucker Act can be found in any of these areas.

1. The most reliable indicia of Congressional intent, of course, are the words of the statutes themselves. *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982). Yet there is no language in the Reform Act which purports to restrict or foreclose excepted service employees' rights to judicial review.

More specifically, Congress provided a detailed procedural mechanism for the protection of employees against whom adverse action had been proposed. For removals, reductions in pay or grade, and suspensions of fifteen days or greater, Congress provided not only specific predeprivation rights, but also rights to a hearing before the Merit Systems Protection Board. Congress provided that a transcript of the hearing be kept, that the employee have the right of representation, and that prevailing employees, when the interest of justice so requires, be entitled to reimbursement for attorney fees. Moreover, Congress provided for judicial review of decisions of the Board in the courts of appeals (now exclusively the Federal Circuit.) *See* 5 U.S.C. §§ 7511-7513; 7701-7703.

Congress did not provide these rights to all employees, however. Rather, Congress gave these rights only to competitive service employees and certain preference eligible employees. *See* 5 U.S.C. § 7511(a)(1). Nonpreference excepted service employees, such as Mr. Fausto, enjoy none of the protections of Chapters 75 and 77, including the right to obtain judicial review under 5 U.S.C. § 7703. Congress could not have been more explicit in placing nonpreference excepted service employees outside the ambit of Chapters 75 and 77.

Congress created extensive procedural protections for competitive service employees, but other than providing that these particular protections were not to apply to excepted service employees, Congress did not address the rights of excepted service employes at all, and certainly did not address the rights that such employees had prior to the enactment of the Reform Act. Congress provided no language such as "disciplinary actions against federal employees are subject to judicial review only as provided herein," or words to that effect.

Congress is capable of limiting or foreclosing judicial review, as it has shown in a vast variety of circumstances. *See Lindahl* v. *Office of Personnel Management*, 470 U.S. at 780 n.13. Yet it chose not to employ such preempting language here. Given "the strong presumption that Congress intends judicial review of administrative action," *Bowen* v. *Michigan Academy of Family Physicians*, 106 S.Ct. 2133, 2135 (1986), Congress' election not to employ such language must be construed as evincing an intent that judicial review remain available. In enacting the Reform Act, Congress is presumed to have been aware both that excepted service employees had preexisting rights to judicial review and that it would require a clear and convincing expression of intent to extirpate those rights. *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 378-79 (1982). Knowing this, it stretches credulity to suggest that Congress intended to foreclose review but neglected to so state.

2. Despite the absence of textual support, this Court has on occasion found the requisite "clear and convincing evidence" even absent explicit statutory language. *See, e.g., Block* v. *Community Nutrition Institute*, 467 U.S. at 345; *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982). But "[g]oing behind the plain language of a statute in search of a possibly contrary intent is a step to be taken cautiously even under the best of circum-

stances." *United States* v. *Locke*, 471 U.S. 84, 95-96 (1985). The circumstances here are far from auspicious.

Significantly, but not surprisingly, there is no legislative history from which an intent to preclude judicial review can be gleaned. Thus, quite unlike the situation in *Erika*, the Court is left with no statutory language *and* no legislative history from which to find a clear and convincing expression of a congressional intent to preclude judicial review.

3. To be sure, on even rarer occasions, this Court has found the requisite intent to bar judicial review solely from the structure of the statute as a whole. *See Block*, 467 U.S. at 349, and cases cited therein. But the government's attempt to show such an intent here by a selective parsing of the statute is mere conjuring that falls far short of yielding a congressional expression of intent to preclude review. Moreover, the government's attenuated attempt to fall within those very limited situations where preclusion of review has been found despite the absence of language or reported legislative history ignores what Congress actually did in enacting the adverse action provisions of the Reform Act.

As this Court has recognized, Congress did substantially rework aspects of the federal personnel system with its enactment of the Reform Act. *Lindahl*, 470 U.S. at 773. But Congress did not, as the government would have this Court believe, repeal existing civil service laws across the board: much from before remained intact.

Congress introduced new matters into the body of federal personnel law in such areas as the Merit Systems Principles (5 U.S.C. §§ 2301-2305), the Performance Appraisal system (5 U.S.C. §§ 4301-4315), and its creation of the Senior Executive Service. 5 U.S.C. §§ 3131-3135. Other areas, such as Retirement (5 U.S.C. §§ 8301-8351), Classification, (5 U.S.C. §§ 5101-5115), Examination, Selection and Placement, (5 U.S.C. §§ 3301-3305)

and Retention Preference, Restoration and Reemployment, (5 U.S.C. §§ 3501-3504), were virtually unaffected.

Importantly for present purposes, Congress' treatment of disciplinary actions amounted to little more than codification of preexisting regulations. Specifically, under the former regulations, 5 C.F.R. § 752 (1978), competitive service and preference eligible employees had the right to notice and an opportunity to respond with respect to suspensions of fifteen days or more, reductions in pay or grade and removal. Under 5 C.F.R. § 772 (1978), they had the right to appeal final decisions to the Civil Service Commission. Congress did substantially modify the appeal procedures with the creation of the Merit Systems Protection Board and the enactment of §§ 7701-7703, but with respect to the rights of employees in disciplinary actions, Congress' only significant substantive change in codifying the existing regulations was to eliminate "reduction in rank" as an appealable action. The new Chapter 77 was intended to rectify problems in the former method of prosecuting appealable actions before the Civil Service Commission, as well as to eliminate an unnecessary level of judicial review by providing for review directly at the circuit court level. *See Polcover* v. *Department of Treasury*, 477 F.2d 1223, 125-26 (D.C. Cir.), *cert. denied*, 441 U.S. 1001 (1973).

Thus, to the extent that a purpose in enacting chapter 77 can be gleaned from the scheme of the Reform Act, it was solely to address the problem found in the former avenues of administrative and judicial review of competitive service employees' appeals. Congress did not embark on a new assessment of whether and how excepted service employees were to be treated. In codifying the former 5 C.F.R. Chapter 75, and creating the new Chapter 77, Congress was only concerned with the rights and remedies of employees covered by Chapter 75, i.e., competitive service and preference eligible employees. In this light, a clear and convincing intent to preclude

judicial review of pre-Reform Act causes of action of excepted service employees, is not "fairly discernible" from the scheme of the Reform Act.[3]

4. There are other significant flaws in the government's argument. The government does not dispute that before the enactment of the Reform Act nonpreference excepted service employees had a right to proceed under the Tucker Act. Thus, the government not only seeks to bar judicial review in the absence of any statutory language, legislative history, or discernible purpose in the legislation, but moreover it seeks to have this Court find that Congress intended to repeal by implication the remedies nonpreference excepted service employees have under the Tucker Act. It is, of course, axiomatic that repeals by implication are disfavored and will only be found where the intent to repeal is "clear and manifest" and there is an "irreconcilable conflict" between the two provisions. *Rodriguez* v. *United States*, 107 S.Ct. 1391, 1392 (1987). No such intent or conflict is present here.

The government cites cases such as *Block* and *Erika* in which the Court has found an intent to preclude judicial review within the same act that created the substantive entitlements. It also cites cases such as *Brown* v. *General Services Admin.*, 425 U.S. 820 (1976), where a putative preexisting right was found precluded because supplanted by a new one. But the government has not cited a single case in which this Court has found that Congress silently in one act repealed a preexisting right to judicial review based upon another act. It would indeed be the extraordinary act of legislation which, without a word of statutory language or legislative history, could accomplish this end.

---

[3] In essence, the government argues that Congress' explicit action to enhance the rights of one class of individuals should be construed as an intent implicity to harm another. This is the same argument that government made, and the Court rejected, in *Lindhal*. *See* 470 U.S. at 787.

5. As this Court recognized in *Bowen* v. *Michigan Academy of Family Physicians*, 106 S.Ct. at 2137, Congress can, within constitutional limits, make exceptions to its historic practice of allowing judicial review of administrative action. Adopting the construction urged by the government, however, may well push the Reform Act past those constitutional barriers. Statutes must be construed, if fairly possible, to avoid raising serious constitutional doubts. *Machinists* v. *Street*, 367 U.S. 740, 749 (1961). Since it cannot be said that the government's construction of the Reform Act is unambiguously mandated, that it would force resolution of serious constitutional questions is of itself sufficient reason for the Court to reject it.

Specifically, the thrust of the government's argument is that those federal employees not given a specific right of action under the Reform Act are relegated to various administrative avenues to press their complaints that are anchored in substantive entitlements conferred outside the Reform Act. But, where such entitlements constrain the employer's right freely to discharge the employee—as in Mr. Fausto's case under the agency's regulations—a property interest in conferred. *See Harrison* v. *Bowen*, 815 F.2d 1505, 1518-19 & n.33 (D.C. Cir. 1987); *Small* v. *Inhabitants of City of Belfast*, 796 F.2d 544, 549 (1st Cir. 1986). If the government is suggesting that such employees are relegated exclusively to the Special Council, this is no more that the "bitter with the sweet" principle that was repudiated by this Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985). Congress cannot conclusively establish what process is due: once a property right has been identified, the Constitution takes over.

Not only does the government's construction of the Reform Act force resolution of the question of whether the protections provided by the various administrative avenues are constitutionally adequate under the *Matthews*

v. *Eldridge* analysis (424 U.S. 319 (1976)), more fundamentally they raise the question whether Congress could constitutionally forestall access to Article III courts for all nonpreference excepted service employees. As this Court held in *Commodity Futures Trading Comm'n* v. *Schor*, 106 S.Ct. 3245, 3256 (1986), the constitutionality of remitting dispute resolution solely to a non-Article III body such as the Office of Special Counsel "is guided by the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.'" *Quoting Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 578 (1985).

It may be that certain disputes "which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments" need not be reviewed in Article III courts. *Crowell* v. *Benson*, 285 U.S. 22, 50 (1932). But disputes which arise between employees and the government acting in its proprietary capacity as an employer are not necessarily disputes for which judicial recourse can be precluded. *Cf.*, *Semann* v. *Mumford*, 335 F.2d 704 (D.C. Cir. 1964). Since this question would be presented by adoption of the government's construction of the Reform Act, and since "a construction of the statute is fairly possible by which the question may be avoided," *United States* v. *Clark*, 445 U.S. 23, 27 (1980), the government's argument must for this separate reason be rejected.

6. There are, as noted above, several reasons why the government's argument must be rejected. In the final analysis, however, the government is doing no more than asking this Court to step in where Congress stayed out and to engraft a provision onto the Reform Act that Congress chose not, or perhaps neglected, to include. The time has long since passed since this Court would entertain such a plea.

II. The Consequence Of The Government's Argument Would Be To Preclude Review In Areas Untouched By The Reform Act

At bottom, the government's position here is that Congress in enacting the Reform Act intended to supersede the preexisting rights to judicial review that excepted service employees such as Mr. Fausto had before the enactment of that law. While acknowledging that the Reform Act itself contains no such express language of supersession, the government nonetheless contends that this preclusive effect is implicit and inheres in the very comprehensiveness of the Reform Act. We have demonstrated above that the government's claims in this regard are premised on manufactured precepts of statutory construction that are without precedent in the decisions of this Court.

In addition to exposing the government's position as wholly novel, it is also important to stress that its views, if adopted, will have far-reaching, unintended, and destructive consequences. For the government's claims cannot on any principled basis be limited to the proposition that preexisting rights of nonpreferecne excepted service employees to gain judicial review of certain adverse actions has been implicitly extirpated by the Reform Act. Its arguments are clearly more far-reaching, and would preclude any preexisting right of judicial review that is not expressly reaffirmed in the Reform Act.

Nowhere is the all-encompassing reach of the government's position better seen than in its thwarting of preexisting rights on the part of federal employees to challenge in court violations of the Classification Act, 5 U.S.C. §§ 5101-5115. While the government in its brief (Pet. Br. at 26-27, n.21) suggests that the ruling here need have no impact on the Classification Act, this is plainly not so. Indeed, the very cases cited by the government on this point reveal that it is relying on the same putative authority and arguments it makes here in

its similar attempt to defeat judicial recourse to raise claims under the Classification Act.

The Classification Act was originally enacted in 1949.[4] It comprehensively regulates the manner in which positions in the federal government are classified for determining the rate of basic pay which an employee will receive. It mandates that the classification of positions shall be based on the principle of "equal pay for substantially equal work," and it directs that the various classes of positions will be described in published standards. 5 U.S.C. § 5101(1) and (2).

Prior to the enactment of the Reform Act it was established that the federal courts were available to hear complaints arising under the Classification Act. *See, e.g., United States* v. *Testan*, 424 U.S. 392 (1976); *Haneke* v. *Secretary, HEW*, 535 F.2d 1291 (D.C. Cir. 1975); *Ward* v. *Campbell*, 610 F.2d 231 (5th Cir. 1980); *Nederstek* v. *Adams*, 449 F.Supp. 286 (D.D.C. 1978); *Todd* v. *Campbell*, 446 F.Supp. 149 (D.D.C 1978). Jurisdiction in these cases was variously grounded on the traditional authority of the courts to review final agency action under the Administrative Procedure Act (5 U.S.C. §§ 701-706) and also under the mandamus authority (28 U.S.C. § 1361).

As with its treatment of excepted service adverse actions, the Reform Act makes no direct mention of the judicial procedures available to review Classification Act claims. Indeed, except for substituting the "Office of Personnel Management" for the "Civil Service Commission," the Reform Act leaves the Classification Act intact, neither adding to nor detracting from its provisions.

---

[4] Pub. L. No. 89-554, 80 Stat. 452 (1966) (originally 63 Stat. 957 (1949)). "The Office of Personnel Management" was substituted for the "Civil Service Commission" in Pub. L. No. 95-454, section 906(a)(2), (3), 92 Stat. 1224 (1978).

The government would have it, however, that this silence is of no consequence, since it must be assumed that Congress intended to eliminate these prior judicial remedies and remit those with Classification Act complaints, no less than nonpreference excepted service employees such as Mr. Fausto, to whatever procedures are provided in the Reform Act.

In this connection, it is illuminating to compare what the government contends here with what it has urged on the courts in post-Reform Act Classification Act cases. Thus, in urging the Court to reject Mr. Fausto's claim to pre-Reform Act judicial remedies, the government asserts as follows (Pet. Br. at 21):

> Finally, in enacting the Reform Act, Congress created the Office of Special Counsel of the MSPB . . . to investigate "[p]rohibited personnel practices" (5 U.S.C. 2302), which are certain specified practices such as coercion of political activity . . . and nepotism . . . Employees in excepted service positions, except for those employees in positions of a confidential or policy making nature, *are* protected by the prohibited personnel practices provision . . . The Special Counsel is authorized to investigate charges brought by excepted service personnel alleging that they have been subjected to prohibited personnel practices.

(Emphasis in original.) In other words, the government is contending that while nonpreference excepted service employees can no longer gain judicial review of the kind of adverse actions to which Mr. Fausto was subjected, the employee may be able to complain to the Special Counsel.

The government makes essentially the identical argument where the claim involved is one that arises under the Classification Act. Thus, in *Barnhart* v. *Devine*, 771 F.2d 1515, 1524-25 (D.C. Cir. 1985), the Court of Appeals precluded judicial intervention to compel the Office of Personnel Management to perform the kind of position-to-position classification that it had previously man-

dated in *Haneke*. In doing so, the Court accepted the government's claim that the plaintiff's recourse was to the Office of Special Counsel, and that to allow the court action to go forward would frustrate the comprehensive scheme of the Reform Act.

Similarly, in its Order of Dismissal in *Finn* v. *OPM*, Civil Action #2:84-2320-1 (D.S.C.), December 31, 1986, the District Court also adopted the very reasons urged by the government here to preclude judicial review to deny jurisdiction to consider a claim that OPM ignored its fundamental responsibility under the Classification Act to publish classification standards. As the Court there put it (at 8-9):

> It is true, as the plaintiffs argue, that prior to the enactment of the Reform Act classification decisions were judicially reviewable under both the APA and the Mandamus Act. . . . However, this court concludes that plaintiffs' argument that employee challenges to Civil Service position classification decisions are still subject to judicial review no longer rings true in this, the post-Reform Act world.

The District Court went on to note that, despite the absence of any mention of the Classification Act in the Reform Act, "classification decisions are subject to the limited remedies provided under the Reform Act." *Id.* at 15. And, according to the District Court, the only remedy provided by the Reform Act is the affected employees' right to initiate a complaint with the Office of Special Counsel. *Id.* at 18.

As can be seen from the foregoing, the contentions made here by the government are not limited merely to the facts presented by this case. The claim is far broader. It is that any preexisting right of action that has its genesis in an unrelated statute—including one with the stature and importance of the Classification Act, which predates the Reform Act by 30 years—is superseded by

the Reform Act's procedures unless it is expressly reaffirmed in the Reform Act. The mere statement of the proposition should betray its utter invalidity.

It must be stressed that the right of action Mr. Fausto claim is not based on the Reform Act. Rather, the Court of Appeals here correctly recognized that Mr. Fausto was proceeding under the Tucker Act, 28 U.S.C. § 1491, and that his right to do so was a matter of long-standing. It also correctly refused to assume that Congress' silence in the Reform Act concerning this preexisting right of action could, through the unprecedented legerdemain employed by the government, be transmuted into an unequivocal intent to eliminate it.

If Congress' silence has this potent and destructive force where the right Mr. Fausto is claiming is involved, it perforce would similarly destroy the long-standing right to challenge deprivations of the Classification Act. But, as we have shown, established rights of action are not so casually eliminated. The canons of construction uniformly endorsed by this Court impose far more stringent requirements than the government can meet here.

Thus, while this case is important in its potential effect, it can and should be resolved by the straight-forward application of settled principles of statutory construction. The issue in this case is neither whether Congress has the power to foreclose such review nor whether to do so would be good policy, but rather whether Congress actually intended such a result. This is the kind of questions that this Court has frequently addressed and the rules it has developed for resolving such issues, as has been shown, unequivocally demonstrate that the result the government urges was *not* intended.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

IRVING KATOR
Counsel of Record
JOSEPH B. SCOTT
MICHAEL J. KATOR

KATOR, SCOTT & HELLER, CHTD.
1029 Vermont Avenue, N.W.
Ninth Floor
Washington, D.C. 20005
(202) 393-3800
Attroneys for *Amici Curiae*

July 10, 1987